REPORTS OF CASES

IN THE

Supreme Court of Nebraska

SEPTEMBER TERM, 1939, AND JANUARY TERM, 1940

VOLUME CXXXVII

HENRY P. STODDART

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For the benefit of the State of Nebraska

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1939

MELVIN DOBESH, APPELLEE, V. ASSOCIATED ASPHALT CONTRACTORS, INC., ET AL.: VILLAGE OF ANSLEY ET AL., APPELLANTS.

288 N. W. 32

FILED OCTOBER 20, 1939. No. 30741.

Appeal. "The supreme court has no power to exercise appellate jurisdiction in proceedings to review the judgments of the district court, unless a transcript is filed with the clerk of this court within the time prescribed by law for taking appeals." *State v. Amsberry*, 104 Neb. 279, 178 N. W. 822.

APPEAL from the district court for Custer county: BRUNO O. HOSTETLER, JUDGE. *Appeal dismissed.*

Chambers, Holland & Locke and *Evans & Lee*, for appellants.

Allan F. Black and *Perry, Van Pelt & Marti, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

PER CURIAM.

This is a compensation case. It arises out of an injury sustained by plaintiff on June 16, 1937, in an accident which arose out of and in the course of his then employment. In the hearing or rehearing in the compensation court, he received an award of compensation against the

defendants Associated Asphalt Contractors, Incorporated, the Village of Ansley, Custer county, Nebraska, and the Travelers Insurance Company, a corporation, from which the defendants above named prosecuted an appeal to the district court for Custer county. From a judgment of affirmance as to defendants Associated Asphalt Contractors, Incorporated, the Village of Ansley, Nebraska, and the Travelers Insurance Company, a corporation, made and entered in the district court for Custer county on May 8, 1939, jointly and severally against the defendants last named, the defendants Village of Ansley, Nebraska, and the Travelers Insurance Company now appeal to this court.

The controlling statute governing the procedure on appeals to the supreme court in compensation cases is included in section 48-174, Comp. St. Supp. 1937, viz.:

"Any appeal from the judgment of the district court shall be prosecuted in accordance with the general laws of the state regulating appeals in actions at law except that such appeal shall be perfected within thirty days from the entry of judgment by the district court and the cause shall be advanced for argument before the supreme court within thirty days from the filing of said appeal, and the supreme court shall render its judgment and write an opinion in such cases within thirty days after submission; Provided, that a judgment, order, or award of the district court may be modified or set aside only upon the following grounds: (1) That the court acted without or in excess of its powers. (2) That the judgment, order or award was procured by fraud. (3) That the findings of fact are not conclusively supported by the evidence as disclosed by the record, and if so found, the cause shall be considered *de novo* upon the record. (4) That the findings of fact by the court do not support the order or award."

"The general laws of the state regulating appeals," employed in the statute quoted, by necessary implication adopt the language of section 20-1912, Comp. St. 1929, reducing, however, the time of perfecting such appeal by filing the transcript certified to by the clerk in this court from "with-

in three months" to "within thirty days" from the entry of the judgment in the district court.

The condition of the record presented on this appeal challenges our attention to certain defects which we will now consider.

We are committed to the view, viz.: "The supreme court has no power to exercise appellate jurisdiction in proceedings to review the judgments of the district court, unless a transcript is filed with the clerk of this court within the time prescribed by law for taking appeals." *State v. Amsberry*, 104 Neb. 279, 178 N. W. 822. See, also, *State v. Amsberry*, 104 Neb. 769, 178 N. W. 828.

One of the essential requirements for perfecting an appeal, as stated by this court, is: "In order to affect an appeal from the district to the supreme court, it is necessary to file with the clerk of this court, within the time prescribed by statute, a transcript of the proceedings, authenticated by the certificate of the clerk of the district court. Such requirement is jurisdictional, and the stipulation of the parties or their attorneys stating that the transcript contains all the proceedings will not supply the omission of the certificate of the clerk of the trial court." *McDonald v. Grabow*, 46 Neb. 406, 64 N. W. 1093. See, also, *Fromholz v. McGahey*, 85 Neb. 205, 122 N. W. 879.

In the instant case there is a clerk's certificate to the transcript. It is in the following form:

"The state of Nebraska }
Custer County } ss.

"I, H. J. Copsey, Clerk of the District Court, Twelfth Judicial District of Nebraska, within and for the County of Custer, do hereby certify that the within and aforegoing is a true and correct copy of.....
.....in a cause in said Court wherein Melvin Dobesh, a minor et al., is plaintiff, and Associated Asphalt Contractors, Inc., et al., are defendants, as the same appears in the files and upon the records of said Court now in my charge as Clerk aforesaid.

"In testimony whereof, I have hereunto set my hand officially and affixed seal of said Court at Broken Bow, Custer County, Nebraska, this 9th day of June, 193.....
"(Seal) H. J. Copsey, Clerk. By.....Deputy."

This is manifestly incomplete. Is it sufficient? Waiving this question for the present, and, for the purpose of the decision only, treating it as sufficient, and as conferring absolute verity on the record to which it is attached, we note that the judgment appealed from, as set forth in the journal entry, was made and entered on the 8th day of May, 1939. This is followed by a motion for a new trial which the record recites was filed on the 15th day of May, 1939. If a motion for a new trial is necessary, it is obvious in this case that it was filed out of time, and is wholly null and void for every possible purpose. Comp. St. 1929, sec. 20-1143.

"A motion for a new trial, to be of any avail, must be filed at the term of court the verdict or decision is entered, and, except for newly-discovered evidence, within three days after the rendition of such verdict or decision.

"The delay of the clerk of the court in spreading the verdict or decision on the court journal will not have the effect to extend the time within which to file a motion for a new trial." *Nebraska Nat. Bank v. Pennock,* 59 Neb. 61, 80 N. W. 255.

See, also, *Hoover v. State,* 126 Neb. 277, 253 N. W. 359; *Heeter v. Nisi,* 134 Neb. 209, 278 N. W. 271; *Weber v. Allen,* 121 Neb. 833, 238 N. W. 740; *Young v. Estate of Young,* 103 Neb. 418, 172 N. W. 49.

We note that the journal entry of May 8, 1939, contains the following, viz.: "Said cause came on further to be heard upon the motion of the Village of Ansley and the Travelers Insurance Company for a new trial and on consideration thereof and the court being fully advised in the premises, said motion for new trial is taken under advisement, on this 8 day of May, 1939."

However, the transcript discloses that the written motion for a new trial had not been filed when this order

taking the same under advisement was entered. Oral motions for new trial are unavailing for every purpose.

"A court has no authority to rule on a motion for a new trial which has not been filed and is not before it, in anticipation that such motion may be subsequently filed.

"A motion for a new trial, filed out of time and not coming within any of the exceptions of the statute, is of no avail for the purposes of a review of errors in this court." *Carmack v. Erdenberger*, 77 Neb. 592, 110 N. W. 315.

See, also, *In re Estate of Swan*, 82 Neb. 742, 118 N. W. 478.

It is obvious, therefore, that we must wholly disregard the motion for a new trial filed on May 15, 1939, as well as the ruling thereon, both as to challenging the attention of this court to errors occurring at the trial and as to fixing the time for perfecting the appeal.

Now, the judgment was rendered on May 8, 1939. There is no evidence that it was actually journalized at a later date. The transcript was not filed in this court until June 12, 1939. This was not within the thirty days prescribed by the workmen's compensation act. It is noted that the præcipe in this case filed by appellants recites that the appeal is "from a judgment rendered on the 11th day of May, 1939." This statement finds no support in the record. But, if it were true, Saturday the 10th day of June, 1939, would be the last day on which the appeal could have been filed in this court. *In re Estate of Getchell*, 98 Neb. 788, 154 N. W. 537; *Frazier v. Alexander*, 111 Neb. 294, 196 N. W. 322.

It follows, therefore, that the transcript on appeal having been filed out of time, this court has no jurisdiction to review the judgment appealed from, and such appeal is accordingly dismissed.

APPEAL DISMISSED.

MARLINE JOY MEYER, APPELLANT, V. NIELSEN CHEVROLET COMPANY, APPELLEE.
287 N. W. 849

FILED OCTOBER 20, 1939. No. 30713.

Workmen's Compensation: DEPENDENTS. This is a case under the workmen's compensation act involving the question of whether or not the plaintiff is entitled to compensation as a dependent child. The facts of the case are reviewed, and the holding of this court in the case of *Palmer v. Hamer*, 133 Neb. 362, 275 N. W. 322, is adhered to and applied.

APPEAL from the district court for Platte county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

Joseph L. Jiranek and *George S. Reeder*, for appellant.

Frederick M. Deutsch, contra.

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

SIMMONS, C. J.

This is a workmen's compensation case involving the question of whether or not the plaintiff is entitled to compensation as the dependent child of Melvin E. Meyer.

That Meyer died from injuries arising out of and in the course of his employment with the defendant as an automobile salesman is not in dispute here. The matter was heard before a single judge of the compensation court, next on rehearing, before the compensation court with three judges sitting, and on appeal, by the district court. Compensation has been denied the plaintiff by each of said courts. Plaintiff appeals from that decision.

Plaintiff was born February 3, 1936, the daughter of Arline Lentz. The mother and Melvin E. Meyer, the deceased, were married April 2, 1936. Prior to the marriage, plaintiff and her mother were living with Effie M. Lentz, mother of Arline. After the marriage, Meyer went to live with his wife, the plaintiff, and the grandmother at the grandmother's home. On June 6, 1936, Arline brought suit for divorce, and thereafter Melvin and Arline did not live

together. However, Meyer did continue to board and room at the grandmother's home until about July 1. Arline Meyer in the divorce petition alleged:

"That the defendant, regardless of his marital duties and obligations as a husband, ever since said marriage, without any just cause or provocation whatsoever on the part of the plaintiff, although he was and is of sufficient ability so to do, has grossly, wantonly and cruelly failed, neglected and refused to support and maintain plaintiff and their minor child with necessaries of life; that the defendant, without any just cause or provocation whatever, on the part of the plaintiff, has been guilty of such conduct which in law amounts to extreme cruelty toward the plaintiff and has on several occasions struck and beat plaintiff violently."

The divorce action was not contested. The divorce was granted September 5, 1936. The material part of the decree provided that "the exclusive care, custody, control and education of their minor child, Marline Joy Meyer, be, and she hereby is, awarded to the plaintiff; that the plaintiff have and recover judgment against the defendant, in the sum of $30 for unpaid temporary alimony for the maintenance and support of said minor child and $25 for unpaid suit money and attorney fee; that the defendant pay to the Clerk of the District Court of Platte County, Nebraska, the sum of $15 per month permanent alimony for the maintenance and support of said minor child aforesaid, commencing on the 5th day of September, 1936, and monthly thereafter until further order of this court."

After the divorce, Arline and plaintiff continued to live at the grandmother's home. On March 14, 1937, Arline Meyer remarried and her second husband came to live with her at the grandmother's home. They were living there when the evidence was taken herein. So, at all times, material here, the physical place of abode of the plaintiff and her mother has been at the home of the grandmother.

Prior to the marriage, Melvin contributed nothing to the support of the plaintiff and her mother. After the mar-

riage, and while living at the grandmother's home, he paid grocery bills amounting to about $20 a month, a sum not equivalent to the value of his board and room. Plaintiff was a bottle baby. The testimony is specific that Melvin did not pay for the milk which the plaintiff required. From June to September he contributed nothing to the family in any way. Pursuant to the decree, in September, 1936, he made one payment of $15, and thereafter made no payments or contributions to the support of the plaintiff. Plaintiff's mother was unemployed. The grandmother contributed to their support. After the second marriage, the new husband contributed his limited earnings to their support.

Plaintiff's mother testified that the deceased wanted to have plaintiff supported; that he said "he could afford to pay $15 a month;" that after the payment of the $15 into court, he said "he wasn't earning enough to support himself properly and could not give any to the baby." Court process was not issued to compel payment pursuant to the divorce decree.

The deceased worked for the defendant as a salesman on commission for seventeen weeks preceding his death. He earned $170.68 in commissions during that time. His earnings otherwise are not shown with the exception of the statement of Arline that at the time he was living with the grandmother his earnings approximated $65 a month. After the divorce decree, Melvin went "out west," where it appeared he had some employment. He returned about January 1, 1937.

Plaintiff's mother testified that the deceased asked her to marry him and give the plaintiff his name; that he admitted the paternity of the plaintiff and called her his daughter in conversation with relatives and others. It does not appear that there was a written acknowledgment of the paternity. The grandmother testified that Melvin thought "a lot" of the plaintiff. However, after the divorce was granted, he did not have plaintiff in his custody and never called to see her or gave her anything. While he was absent from Columbus for several months after the di-

vorce, he did not communicate with plaintiff's mother or grandmother, and they knew only approximately when he went away and when he returned.

Claimants have only the rights created by the compensation law. The legislature has the power to say who shall receive compensation and in what amounts.

Courts do not have the power to extend the benefits of the act beyond the limits fixed by the legislature no matter how unjust the statute may appear to operate in particular cases. The purpose of the act is to compensate an employee for the loss of his earning power, and in case of the death of the employee, to compensate his dependents for the loss of support which they have been receiving and which, but for the injury to the employee, they had a reasonable right to expect would probably continue. In case of death, the payment of compensation is not made for the purpose of enriching the estate of the deceased, nor does it go to his heirs under the laws of descent.

The amount of compensation to be paid bears direct relation to the loss of earnings and to the deprivation of support flowing from wages theretofore received by the employee. In case of the death of an employee, the compensation to be paid to those partially dependent upon his earnings for support is further based upon the proportion that the amount contributed by the deceased to his partial dependents bears to the total wages received by the deceased.

Section 48-124, Comp. St. 1929, provides: "The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee: (a). A wife upon a husband with whom she is living at the time of his death; (b). Husband upon a wife with whom he is living at the time of her death; (c). Child or children under the age of eighteen years * * * upon the parent with whom he is or they are living at the time of death of such parent, there being no surviving parent. * * * (d). * * * The terms 'child' and 'children' shall include step-children and adopted children if members of the deceased's household at the time of his death, and shall include posthumous children.

* * * (e). In all other cases, questions of dependency, in whole of (or) in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury; * * * (f). No person shall be considered a dependent, unless he or she be a member of the family of the deceased employee, or bears to him the relation of widow or widower, or lineal descendant, or ancestor, or brother, or sister. (g). Questions as to who constitute dependents and the extent of their dependency shall be determined as of the date of the accident to the employee."

This section of the statute divides dependents covered by the act into two groups: First, those who are conclusively presumed to be dependent; and, second, those who are dependent in fact.

In the first classification, dependency is conclusively presumed as a matter of law; in the second group, dependency must be proved.

Plaintiff, contending that she is conclusively presumed to be a dependent within subdivision (c) relies on the proposition that as a matter of law she was "living" with her father at the time of his death, and cites *Harrison v. Cargill Commission Co.*, 126 Neb. 185, 252 N. W. 899. Plaintiff further contends that the clause "there being no surviving parent" must be construed to mean no surviving parent capable of receiving compensation. The latter proposition we need not decide.

Harrison v. Cargill Commission Co., supra, was a case where a woman was confined to a hospital for the insane. Her husband was killed. The widow was held to be "living" with her husband at the time of the accident. The case clearly turned upon the proposition that there had been no change in the legal status of the parties. There was no estrangement or divorce or purpose to separate, or agreement to live apart, or wrong-doing or violation of the marital relations or duties. The wife, had she been restored to mental competency, would have returned to her place of abode with the husband. This court there specifically said (quoting from *Northwestern Iron Co. v. Industrial Commis-*

sion, 154 Wis. 97, 142 N. W. 271): "The 'living together' contemplated by the statute, we think, was intended to cover cases where no break in the marriage relation existed, and therefore physical dwelling together is not necessary, in order to bring the parties within the words 'living together.' There must be a legal separation or an actual separation in the nature of an estrangement, else there is a 'living together' within the meaning of the statute." The distinctions are clear between the *Harrison* case and the instant case. It would do great violence to the English language and to the plain meaning of the statute to hold that the plaintiff, under the facts of this case, was, as a matter of fact or law, living with the deceased at the time of his death.

Plaintiff contends that in any event she is entitled to compensation under subdivision (e); that she was by virtue of the divorce decree legally dependent upon the deceased, and that that is sufficient.

It is the loss of the support, the loss of the financial contributions of the employee, which determines the right of the dependent to compensation—not the mere existence of some legal right to support. That the statute means that there must be proof of dependency in fact and not mere legal dependency is established by section 48-122, Comp. St. Supp. 1937, which provides: "(2) If at the time of the accident which resulted in his death the deceased employee leaves no persons wholly dependent, but leaves persons partially dependent upon his earnings for support, compensation shall be paid on account of the benefits provided in subdivision 1 of this section for persons wholly dependent, *in the proportion that the average amount regularly contributed by the deceased from his wages for a reasonable time immediately prior to the accident, to such persons who were partially dependent, bears to the total wages of the deceased during the time.*"

If we were to assume in this case that legal dependency were sufficient and if we found that the dependency of the plaintiff was partial, then upon what basis could the com-

pensation be figured? The deceased had contributed nothing to the support of the plaintiff from his wages for a reasonable time immediately prior to the accident. There is no contribution upon which compensation could be figured. That provision establishes the fact that the legislature contemplated that dependency under subdivision (e) meant actual and not a naked legal dependency.

It clearly appears that in the instant case the plaintiff's mother did not rely for the plaintiff's support upon the payment of the amount awarded in the divorce decree; that the deceased had made no contributions to the support of the plaintiff from his earnings for a reasonable time immediately prior to the accident; that he did not intend to make contributions from his earnings to the support of the plaintiff; and that the death of Meyer did not deprive the plaintiff of any support that she had been receiving or had any reasonable expectancy of receiving.

The courts below decided the case upon the authority of *Palmer v. Hamer*, 133 Neb. 362, 275 N. W. 322. Plaintiff vigorously assails the rule there announced. This court there held that legal dependency was insufficient, under our statute, to support a claim for compensation, and where children are living with a stepfather, in order to establish dependency of the children upon the father, that actual support by the father must be shown.

We have reexamined the rule there announced and adhere thereto. It is fully supported by an analysis of the statute and by the authorities. See 71 C. J. 250, 527, 529, 531; *Utah Fuel Co. v. Industrial Commission*, 80 Utah, 301, 15 Pac. (2d) 297, 86 A. L. R. 858; *Weliska's Case*, 125 Me. 147, 131 Atl. 860; *Roberts v. Whaley*, 192 Mich. 133, 158 N. W. 209; *Ocean Accident & Guarantee Corporation v. Industrial Commission*, 32 Ariz. 54, 255 Pac. 598; *Sweet v. Sherwood Ice Co.*, 40 R. I. 203, 100 Atl. 316; *Glaze v. Hart*, 225 Mo. App. 1205, 36 S. W. (2d) 684; *Franklin Fluorspar Co. v. Bell*, 247 Ky. 507, 57 S. W. (2d) 481; *Lloyd-McAlpine Logging Co. v. Industrial Commission*, 188 Wis. 642, 206 N. W. 914; *Ahmed's Case*, 278 Mass. 180, 179 N. E. 684, 79

A. L. R. 669; *Gossen v. Township of Borgholm*, 174 Minn. 227, 218 N. W. 882; *Kral v. Lincoln Steel Works*, 136 Neb. 31, 284 N. W. 761; *Colorado Fuel & Iron Co. v. Industrial Commission*, 90 Colo. 330, 9 Pac. (2d) 285.

Anything to the contrary in the opinion of this court in *Parson v. Murphy*, 101 Neb. 542, 163 N. W. 847, is overruled.

The decree of the district court is

AFFIRMED.

ARDEN CRANDALL, APPELLANT, V. MARIE LUHNOW: ARTHUR E. SCHRAM ET AL., APPELLEES.
288 N. W. 29

FILED OCTOBER 20, 1939. No. 30663.

1. **Divorce**: CUSTODY OF CHILDREN. "In considering the custody of a child, the matter of primary concern is the welfare and best interests of such child. This is paramount to the wishes of parents or grandparents." *Hobza v. Hobza*, 128 Neb. 598, 259 N. W. 516.
2. ———: ———. It is usually best for the court to keep minor children in a divorce case within the jurisdiction of the court, for it is impossible to anticipate, at the time of trial, changes which may occur in the habits, character, fitness, or financial condition of either parent.

APPEAL from the district court for Dixon county: MARK J. RYAN, JUDGE. *Reversed.*

John E. Newton, for appellant.

Carlos W. Goltz and *Kingsbury & Kingsbury, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

PAINE, J.

Plaintiff husband granted divorce from wife for cruelty, and given custody of six-year-old daughter. Husband, los-

ing the farm he had rented, and doing odd farm jobs, turns his daughter over to his parents. Mother of daughter, having remarried, files application to take daughter to her home in San Diego, California. Arthur E. Schram, maternal grandparent, also asks court for custody of the little girl. Father resists all such applications, but court awards custody of child to said Arthur E. Schram and Edith Schram, his wife. Plaintiff filed motion for new trial, supported by affidavits. Motion overruled, but order of execution to sheriff to place child in custody of maternal grandparents stayed pending appeal.

As the determination of the issues involved rests upon the evidence offered, a rather full statement of the facts will be made.

On August 15, 1936, Arden Crandall filed petition for divorce against Marie Crandall, now Marie Luhnow, alleging that the parties were married at Sioux City, Iowa, September 29, 1924, but always lived in Dixon county, Nebraska. Plaintiff charged defendant with cruelty, in that she disliked the hard work required of a farmer's life, and this led to frequent quarrels, and on one occasion she slapped the plaintiff in a public dance hall, to his great embarrassment and humiliation, and finally she picked up her personal effects and left, saying that she would never return.

Plaintiff alleged that on August 28, 1930, a daughter, Mona Joyce Crandall, was born as the issue of said marriage, and he alleges that he is a proper and fit person to have the care, custody, and maintenance of said child. He asks for a divorce and the custody of the daughter.

The defendant in her amended answer denied each and every allegation contained in said petition.

Trial was had and a decree entered, and the allegations of the petition found true, and that defendant has been guilty of cruel and inhuman treatment of plaintiff. It was held that plaintiff was entitled to the custody of Mona Joyce Crandall, subject to the right of the defendant and defendant's parents, Mr. and Mrs. Arthur E. Schram, to visit said minor child at any reasonable time. The decree

also gives to the defendant the piano, rug, bed, bedding, dresser, chairs, pictures, books, and alimony of $200, payable $50 cash and three payments of $50 each at the dates set out in the decree.

On August 11, 1938, the defendant, under her new name of Marie Luhnow, filed application for modification of the decree, and asked that she be given the sole custody of the daughter, Mona Joyce Crandall. The reasons alleged for such change in custody are that the plaintiff was formerly a fairly prosperous farmer, but that he is now hardly able to maintain himself, doing odd jobs as a farm hand; that he has turned the care, custody, and control of the child over to his parents, who are farm renters, who, it is charged, profess no religion and are both uneducated persons, and have stated that they do not believe in the education of children.

It is further set out in said application that the circumstances of the defendant have also changed, in that she has married Lester Luhnow, who is permanently employed by the gas and electric company in San Diego, California, and that as a result of such remarriage there has been born to her a child; that they have a modern home in a nice community, close to a public school and a Christian church, which home is located at 3888 Beta street, San Diego, California. That Lester Luhnow is willing and able to assume towards Mona Joyce Crandall the relationship of a father, to give her many advantages, and to care for said child as his own.

On January 30, 1939, a revised decree was entered, setting out that evidence had been taken at Ponca, Dixon county, and at Pender, Thurston county, the plaintiff appearing and resisting the application for a change in the decree.

Arthur E. Schram, maternal grandparent of Mona Joyce Crandall, asked the court on its own motion to revise the decree and award to him and his wife the care, custody, and maintenance of said granddaughter.

The decree recites that, after listening to all of the testi-

mony and observing the demeanor of each of the witnesses, and having heard arguments of counsel and taken the matter under advisement, the court finds that the plaintiff did not pay the full sum of $200 awarded in the former decree until an application was filed to cite and punish him for contempt of court, whereupon he paid the balance; that the plaintiff did place the said Mona Joyce Crandall in the home of his parents in Cedar county, Nebraska, and by reason of the small size of the home, and the large number of people living therein, it was not an adequate place for the rearing of the child, and the court finds that it is not for the best interests of Mona Joyce Crandall that she longer remain therein.

The court further refuses to entertain the application of the mother to remove the child from its jurisdiction to California, but finds that it is now for the best interests of the child that Mona Joyce Crandall be given into the care, custody, control, and maintenance of Arthur E. Schram and his wife, Edith Schram, the maternal grandparents, and the sheriff is directed to forthwith execute the order, and take said child, wherever found, and deliver the child to Mr. and Mrs. Schram. It is further ordered that the plaintiff and the defendant shall each have the right to see and visit said minor child in the home of Mr. and Mrs. Schram at reasonable times.

In September, at the hearing on the application of the defendant, the plaintiff testified that he had had the custody of his daughter since it was awarded to him in the original case; that he and his brother ran a filling station in Walthill, the brother being married, and they all lived together, and that the little girl remained there until school was out, when he took her to the home of his parents, where she then attended a country school, taught by Elizabeth Bracht, and that also she attended Sunday School when living with his parents, and that his parents went to church. He testified that he planned to keep the daughter himself next year, as he was planning on getting married to the school-teacher who had taught his daughter in the country school. He

claimed that she had a one-fourth interest in 160 acres of clear land, that she had some money, and that her parents were both dead, and that he expected to be married by December and rent a farm and move onto it.

A neighbor testified that her children went to the same school with the plaintiff's daughter, Mona Joyce; that she was clothed warmly in the winter-time; that she was a polite, well-behaved child; that her grandparents took her to Sunday School whenever the roads were passable; that the little girl was in good health, and neat and clean, and seemed to have plenty to eat.

Immediately after the decree granting the custody of the minor to the maternal grandparents, the plaintiff filed a motion for a new trial, setting out that the judgment and decree is contrary to law, not sustained by sufficient evidence, is not confined to the issues presented by the pleadings, but goes far beyond said pleadings, and that said evidence fails to show that the plaintiff is an unfit person to have the care, custody, and control of said child, and for newly-discovered evidence caused by the change in circumstances of the plaintiff.

Several affidavits in support of said motion for rehearing were filed, one of said affidavits being filed by the new wife of the plaintiff, Mrs. Arden Crandall, formerly Miss Elizabeth Bracht, setting up her marriage to the plaintiff on September 29, 1938, and that for six years prior thereto she has been a school-teacher; that she and her husband have established a new home on a farm just west of Hartington, Cedar county, Nebraska; that the lease they have runs until 1940; that the farm is 153 acres, and a good, productive farm, and that they are now fully equipped and financially able to properly farm the same; that they have a good consolidated public school, and church and Sunday School facilities near-by, and that Mona Joyce Crandall is now eight and a half years old, and has been making her home with them since their marriage, and receiving every care and attention required and necessary for a child of her years; that she is regularly attending school, and is

receiving proper religious training, both in the home and in the near-by church; that she is also receiving training in music and other accomplishments, and that the stepmother is willing and anxious to assume the custody and help her husband raise his daughter, and will raise her as though the child were her own.

On February 4, 1939, the cause came on for hearing upon the motion of plaintiff to reopen said case and introduce this new evidence arising since his marriage and the establishment of a home. The court denies said motion for the reason that the plaintiff had remarried more than a month prior to the opening of the term at which the decree was announced, "and if plaintiff desired to rely upon said change in circumstances, and to urge the same as a reason for his being granted custody of the minor Mona Joyce Crandall, he had ample time to apply to the court for leave to reopen the case and present such testimony."

The court further says in its order: "The court does not see fit at this time to alter its order entered January 16, 1939, but will do so, of (if) and when the plaintiff can satisfy the court that his home, resulting from his second marital venture, is of a stable character and a proper home for his minor child. * * * It appearing further to the court that an appeal is contemplated, it is further ordered that execution of the order of January 16, 1939, be withheld pending said appeal, provided it is lodged in the supreme court within 30 days."

The decree hereinabove set out was dated January 30, 1939, and a bond for appeal was given nine days thereafter, and the transcript was filed in the supreme court on March 4, 1939.

The result of the court withholding the order to the sheriff to put the minor in the possession of her maternal grandparents has been to leave the minor with the plaintiff and his present wife for over a year.

The father is generally entitled to the custody of his children because of his obligation to maintain and educate them. 17 Am. Jur. 511, sec. 673. But our court has said

those of tender age are usually awarded to the mother. *Swolec v. Swolec,* 122 Neb. 837, 241 N. W. 771.

However, in the case at bar, the mother abandoned her child and remarried, and lives in California. It is usually best for the court to keep children within its custody, for it is impossible to anticipate changes which may occur in the habits, character, fitness, or financial condition of the parents. 17 Am. Jur. 518, sec. 684. The matter of primary concern is the welfare and best interests of the child.

This court has said: "The father is entitled to the custody of the daughter, rather than the maternal grandparents, where he is an entirely proper person, and has a satisfactory place to keep her, considering all facts relating to her age, care, education, and maintenance." *Hobza v. Hobza,* 128 Neb. 598, 259 N. W. 516. See, also, *Voboril v. Voboril,* 115 Neb. 615, 214 N. W. 254.

In view of the time that has now elapsed since the previous order of the trial court, we believe the interests of the child would be best served by reexamination of the entire situation of the parties. The cause is accordingly remanded to the trial court for this purpose.

REVERSED.

EDWIN A. REILS ET AL., APPELLANTS, V. ALFRED NICHOLAS ET AL., APPELLEES.
287 N. W. 853

FILED OCTOBER 20, 1939. No. 30642.

1. **Corporations.** "Subsequent stockholders have no standing, as a general rule, to attack prior mismanagement of the corporation." *Home Fire Ins. Co. v. Barber,* 67 Neb. 644, 93 N. W. 1024.
2. ———. The right of a stockholder to sue exists because of special injury to him for which, otherwise, he is without redress. If his interest is trifling and the injury thereto of no consequence, he cannot sue to compel righting of wrongs to the corporation. *MeHenry v. New York, P. & O. R. Co.,* 22 Fed. 130.
3. **Charities.** Where the evidence discloses that a stockholder's suit is not brought in good faith in the interests of the cor-

poration, and such stock was acquired only for the purpose of bringing suit, the complainant is a mere interloper and entitled to no consideration.

4. ———. Courts of equity exercise extensive supervisory jurisdiction over charitable trusts to protect them and enforce their execution. However, where the evidence discloses that the trustees have reasonably, fairly and honestly exercised their discretion in attempting to comply with the terms of the trust, a court of equity will not interfere and substitute its own discretion for that of the trustees.

APPEAL from the district court for Merrick county: FREDERICK L. SPEAR, JUDGE. *Affirmed.*

C. A. Sorensen and *Homer L. Kyle,* for appellants.

Walter R. Raecke and *Harold A. Prince, contra.*

Heard before EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

Edwin A. Reils, a minority stockholder, instituted this action in equity for himself and all stockholders similarly situated, and included the Coolidge Hospital and Sanitarium, a corporation, as plaintiff, against the trustees and secretary and treasurer of such corporation, to compel them to properly perform the obligations of a charitable trust.

The corporation was organized for charitable purposes under article 6, ch. 24, Comp. St. 1929. The articles of incorporation contain the following: "The objects and purposes of this Institution are, and shall be to assist those suffering with physical and mental disease or infirmity and no worthy person shall be excluded from the privileges and benefits thereof because of poverty."

The trial court dismissed the plaintiffs' cause of action, and from such order of dismissal the plaintiff Reils appeals, alleging as error the trial court's failure to order and direct the defendants, as trustees of the corporation, to operate and maintain its hospital in accordance with the articles of incorporation.

The Coolidge Hospital and Sanitarium was organized in 1917 and was the inspiration of Charles L. Coolidge, one

of the incorporators and for whom the hospital was named. The hospital is situated in Palmer, Nebraska, a town with a population of 600. Mr. Coolidge donated three farms to the corporation. The proceeds of the sale of two of the farms were sufficient to cover the cost of erecting the buildings and equipping the hospital, which accommodates 10 beds. There remained a 10,000-dollar endowment fund and a working capital of a few hundred dollars. The income of the corporation has been limited to the interest on the endowment fund, now invested in government securities, and rents received from a quarter-section of land, the total amount of which has not exceeded $1,000 a year in recent years.

At the outset the trustees endeavored to keep the hospital open by employing help for such purpose. The income from all sources was insufficient to keep the hospital in operation. Another and different means of operating it was found to be necessary. The matter was taken up with Mr. Coolidge, and the difficulties affecting the hospital were explained to him. The trustees attempted to comply with Mr. Coolidge's wishes and leased the hospital to different doctors who paid no cash rent of any kind. Mr. Coolidge knew of this arrangement and approved it. He died in 1923 or 1924. The hospital was leased in 1929 by the trustees to plaintiff, who occupied the premises until May 1, 1937. He was to care for and keep up the lawn and building. Material expenditures were taken over by the corporation. Reils was to permit other doctors to use the hospital, and in the operation thereof he was permitted to receive the profits. In 1935 difficulties arose between the trustees and Doctor Reils over his alleged refusal to cooperate with other doctors by permitting them to use the hospital as agreed upon. He was permitted to remain in the hospital through the year 1935 without a lease and until September, 1936, when a new lease was executed, expiring May 1, 1937. The dispute culminated in a suit in forcible entry and detention, wherein a judgment was rendered against Doctor Reils in the county court and an

appeal was perfected, the doctor removing from the hospital May 1, 1937. Doctor Reils testified that he first learned during the summer of 1935 that the hospital organization was a charitable one. November 27, 1936, he sent a postal money order for $5 as a donation to the corporation, which was rejected.

Stock in the corporation was issued in 5-dollar shares; each donor to the corporation in the amount of $5 would be entitled to one share of stock, and each share would entitle the owner thereof to one vote at stockholders' meetings. The stock was nonassessable and nontaxable, and no holder thereof was to receive any benefit from the corporation by reason of his ownership of such stock. The purpose of issuing the stock was to enable the corporation to perpetuate itself and designate who should have the right to vote and take part in the government and control of the corporation. It is apparent that the endowment fund and the property of the corporation, in the event it should be subsequently operated by some other charitable institution, could not be profitably divided among the stockholders, as claimed by plaintiff Reils.

About December 15, 1936, Doctor Reils procured 10 shares of stock in the corporation from one of his patients, crediting the patient with the amount of $50 on his account. He thereby became a minority stockholder. He carried on a publicity campaign in a newspaper and by handbills, setting forth that the hospital was organized for charitable purposes and admonishing that the trustees should comply with the purposes of the corporation and fulfil their obligations to the public accordingly. The hospital is now leased to a trained nurse for the same consideration for which Doctor Reils rented it. He at this time operates what is known as the Cottage Hospital.

Doctor Reils is the only person appearing for the plaintiffs, and, even though the corporation is named as a plaintiff, it is apparent that it is not, in reality, a party plaintiff. The conduct of Reils as a minority stockholder is obvious. Without doubt, the hospital should be run,

if possible, as contemplated by its articles of incorporation, and the trustees have shown an earnest endeavor to so operate it. It is not conceivable that, on a 10,000-dollar endowment fund and with an income of less than $1,000 a year, the hospital could be operated as contemplated in the articles of incorporation. Even the donor of most of the funds used in building the hospital and creating its endowment fund was told of this difficulty and disclosed his desire to have the hospital kept open. The record is void that any person, eligible to be treated in the hospital free of charge, has ever requested such treatment.

There is no occasion to discuss the 10,000-dollar loan complained of by Doctor Reils in this proceeding, for the reason that the money evidencing such loan had been turned back to the corporation, and by its trustees invested in government securities, prior to the time that the plaintiffs' action was tried, and Doctor Reils' complaint relating to such transaction is a nullity. He is not in a position to complain of the prior acts and management of this corporation.

As held in *Home Fire Ins. Co. v. Barber*, 67 Neb. 644, 93 N. W. 1024: "Subsequent stockholders have no standing, as a general rule, to attack prior mismanagement of the corporation." In *Alexander v. Searcy*, 81 Ga. 536, 8 S. E. 630, 12 Am. St. Rep. 337, the court stated (p. 550): "The weight of authority seems to be that a person who did not own stock at the time of the transactions complained of, cannot complain or bring a suit to have them declared illegal."

In *Home Fire Ins. Co. v. Barber, supra*, it is further said: "The right of the stockholder to sue exists because of special injury to him for which otherwise he is without redress. If his interest is trifling and the injury thereto of no consequence, he cannot sue to compel righting of wrongs to the corporation. *McHenry v. New York, P. & O. R. Co.*, 22 Fed. 130; *Albers v. Merchants Exchange of St. Louis*, 45 Mo. App. 206."

It will be recalled that Doctor Reils, apparently for the purpose of bringing this action, obtained his stock December 15, 1936, seven years after he had had the use of the hospital under the arrangement, as above stated, and at the time of the difficulty with the trustees.

The cases which hold that a subsequent stockholder may sue for mismanagement are reflected by the case most commonly cited, *Ramsey v. Gould*, 57 Barb. (N. Y.) 398, discussed in the *Barber* case (p. 659): "Plaintiff, believing that there had been mismanagement, bought shares for the purpose of proceeding against the directors and officers and 'bringing them to justice.' The court permitted the suit upon the ground that plaintiff's motives were immaterial. But it assumed, without discussion, that he had an interest to vindicate, and had suffered some wrong, which is the real question on which such cases depend. Moreover, it is by no means clear that the motives behind a stockholder's suit are immaterial. Where stock is acquired for the purpose of bringing suit, it has been held that the complainant is a mere interloper, entitled to no consideration. (Citing *Hawes v. Oakland*, 104 U. S. 450, and other cases.) And stockholders' suits not brought in good faith in the interests of the corporation have been dismissed on that ground." Citing *Beshoar v. Chappell*, 6 Col. App. 323, 40 Pac. 244.

A principle of law applicable to the instant case follows: "While equity will compel the trustees to exercise their discretion, and will decide, as a question of fact, whether the trustees have reasonably and fairly exercised their discretion, where such discretion is being fairly and honestly exercised the court will not control or interfere with it, nor substitute its own discretion for that of the trustees." 14 C. J. S. 508, sec. 49.

Courts of equity have general supervision and administration of charitable trusts and exercise extensive supervisory jurisdiction over such trusts to protect them and enforce their execution. In the instant case, the trustees have exercised a reasonable and fair discretion in the

management of the trust, considering all of the circumstances and conditions surrounding it.

The judgment of the district court is

AFFIRMED.

IN RE GUARDIANSHIP OF LEO M. WARNER.
ROBERT RICHARDSON ET AL., APPELLEES, V. LEO M. WARNER, APPELLANT.
288 N. W. 39

FILED OCTOBER 27, 1939. No. 30538.

1. **Jury.** A jury trial cannot be demanded, as a constitutional right, in proceedings for the appointment or removal of guardians, in the absence of a statute providing therefor.
2. ———. In proceedings not within the application of the constitutional provisions, the fact that an appeal is allowed does not entitle parties to demand a jury trial.
3. ———. The interposition of a jury in trials of appeals from the probate courts to the district courts is mandatory only when the inherent nature of the issues to be determined, in the light of constitutional and code provisions or the express terms of statutes which may be involved, so require.
4. ———. The interposition of a jury in trials of appeals from the county courts of this state to the district courts thereof, where there is involved only the appointment or refusal to appoint guardians for alleged incompetent wards, is a matter of discretion and not a matter of right.
5. **Trial.** In suits not triable by jury as of right, a verdict of a jury is advisory only.
6. **Jury.** In the instant case, the issues involved not being triable to a jury as a matter of right, the verdict returned therein in the district court is not to be deemed conclusive, but as advisory only, and the ultimate responsibility for the determination of the facts involved rests with the trial judge and not with the trial jury.
7. **Appeal.** In this proceeding, in this court, reversible error cannot be predicated on the admission of incompetent or immaterial evidence, or upon instructions given or refused by the trial court. The trial court is presumed to have disregarded evidence improperly received, and instructions given are not reviewed in the appellate court.

8. **Judgment**: COLLATERAL ATTACK. "A collateral attack on a judicial proceeding is an attempt to avoid, defeat, or evade it, or to deny its force and effect in some manner not provided by law. * * * When a judicial order, judgment or proceeding is offered in evidence in another proceeding, an objection thereto on account of judicial errors is a collateral attack." Van Fleet, Collateral Attack on Judicial Proceedings, 5.
9. **Insane Persons.** "In a proceeding for the appointment of a guardian for alleged incompetency because incapable of caring for his property, where the person is a party to the proceeding and has not been adjudged insane, his admissions, declarations, and showing of facts inconsistent with mental soundness are admissible as substantive evidence on the issue of sanity." (And this same rule was applied to the decision of the issue of competency.) *Keiser v. Keiser*, 113 Neb. 645, 204 N. W. 394.
10. **Judgment**: COLLATERAL ATTACK. "'The sufficiency of the petition,' in a court of record, 'is not a test of jurisdiction, as the court may commit an error in holding it sufficient; but this, if the court had jurisdiction, will not render the judgment subject to collateral attack.' *Taylor v. Coots*, 32 Neb. 30." *Brandeen v. Lau*, 113 Neb. 34, 201 N. W. 665.
11. ———: JURISDICTION. "The omission of an allegation of a jurisdictional fact, in a judgment of a court of record, is cured by proof of the existence of such fact, and where, in such court, a judgment is rendered, and is silent with respect to a jurisdictional fact, it will be presumed that the court acted within its jurisdiction. Woerner's American Law of Administration (3d ed.) secs. 143-145." *Brandeen v. Lau, supra.*
12. **Courts**: JURISDICTION. "Jurisdiction of the subject-matter, in a court of record, is to be tested by the authorized extent of the powers of the court in respect of the cause of action before it. Woerner's American Law of Administration (3d ed.) sec. 144." *Brandeen v. Lau, supra.*
13. ———: ———. "In a court of record, it is not essential that every jurisdictional fact appear upon the face of the record, and if a petition sets out facts sufficient to show a cause of action within the general jurisdiction of the court, and no facts appear upon the face of the record establishing that no jurisdiction exists, all presumptions are resolved in favor of the power of the court to act." *Brandeen v. Lau, supra.*
14. **Insane Persons.** The rules as to collateral attack are applicable with full force to proceedings *in rem* and *quasi in rem*, such as adjudications of insanity and determinations of mental incompetency.

15. **Evidence** in the record examined, and *held* sufficient to sustain the judgment and findings of the district court.

APPEAL from the district court for Polk county: HARRY D. LANDIS, JUDGE. *Affirmed.*

Kirkpatrick & Dougherty, for appellant.

W. W. Norton and *O. S. Gilmore, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

EBERLY, J.

Robert Richardson and Hazel Richardson filed in the county court of Polk county a petition, alleging that "Leo M. Warner, an inhabitant of and residing in Polk county in the state of Nebraska, is mentally incompetent to have the charge and management of his property;" that said incompetent person is possessed of personal property situated in Polk county of the value of about $4,500 and is also the owner of an interest in real estate situated within the state of Nebraska of the value of about $300; that said incompetent person has minor children dependent upon him for support, and it is necessary for the welfare of said incompetent person and his dependent children that a guardian be appointed for the purpose of taking charge of the property, etc. The petition also sets forth that petitioners are relatives of said incompetent person, being a nephew and a niece of him, and prays for the appointment of E. C. Nordlund as such guardian. Notice of hearing on this petition was served on Leo M. Warner, Eva B. Warner, Floyd M. Warner, Dean M. Warner and Herbert K. Richardson. A demurrer was thereupon filed to said petition by Leo M. Warner, challenging the capacity of the plaintiffs to sue, the jurisdiction of the county court to hear the proceeding, and the sufficiency of the petition to state a cause of action. Thereupon Leo M. Warner filed an answer which carried forward the challenge to the capacity of plaintiffs to sue and to the jurisdiction of the county court, and denied generally the allegations of the petition. On August 16, 1937, being the date to which the hearing on said matter

was continued by consent and agreement of parties, the county court overruled the demurrer of Leo M. Warner, also adjudged that "due and legal service has been had on all parties herein as provided by law, and that the facts set out and alleged in the petition filed herein are true and that said Leo M. Warner is mentally incompetent to have the charge and management of his property," etc. Further, the county court appointed E. C. Nordlund as guardian of said Leo M. Warner. In connection with this judgment there appears a stipulation that service of process was lawfully obtained as provided by law upon Leo M. Warner, the alleged incompetent, herein, and the next of kin of said Leo M. Warner. E. C. Nordlund thereupon qualified as such guardian and gave his official bond which was duly approved on August 26, 1937.

Leo M. Warner appealed from the judgment so entered, and on October 6, 1937, petitioners Robert Richardson and Hazel Richardson filed in this cause in the district court for Polk county, Nebraska, their petition on appeal which contained the essential averments originally set forth in the petition filed by them in the county court of Polk county, Nebraska. To this petition on appeal, Leo M. Warner answered by a general denial. The issues thus made up were submitted by the district court to a jury, which, after hearing the evidence, returned as their findings and verdict "That Leo M. Warner is now incompetent to have charge and management of his property." Thereupon Leo M. Warner filed his motion for a new trial which was by the district court overruled, and thereupon a judgment was entered for petitioners as prayed. This judgment recites, in part, viz.:

"Now, on this 14th day of July, 1938, this matter came on for hearing upon said motion for new trial and for a consideration of the advisory verdict of the jury and after due consideration, the court finds that said motion for new trial should be overruled, and an order and decree entered herein in accordance with the advisory verdict returned by the jury in said matter; further, the court finds that the

allegations set forth in the petition herein are true, and finds generally for the petitioners; further the court finds from the evidence submitted that the said Leo M. Warner is now incompetent to have charge and management of his property, and that the appeal herein should not be sustained, and guardianship affirmed, and the case remanded to the county court for further proceedings.

"It is therefore, ordered, adjudged and decreed by the court, that the motion for new trial filed herein by Leo M. Warner, be, and the same is hereby overruled; that Leo M. Warner is now incompetent to have the care and management of his property and estate; that he should have a guardian to manage and handle his property and estate, and that the appeal in said guardianship matter to this court be not sustained, and that the guardianship findings and decree of the county court should be sustained and the same is hereby affirmed and sustained and said case is hereby remanded to the county court for further proceedings."

From this judgment, Leo M. Warner appeals.

Preliminary to a consideration of the merits of this appeal is the necessity of determining the effect of the submission of the issues to a jury in the district court, and the nature of the verdict returned therein, whether conclusive or advisory only.

"A trial by jury cannot be had in a probate court unless expressly authorized by statute, since such courts, having always proceeded without the intervention of a jury, are not within the application of the constitutional provisions relating to jury trials." 35 C. J. 151.

Section 16, art. V of the Constitution of Nebraska, provides: "County courts shall be courts of record, and shall have original jurisdiction in all matters of * * * appointment of guardians, and settlement of their accounts," etc. This confers on county courts exclusive original jurisdiction over the subject of the appointment and removal of guardians. *Stewart v. Herten,* 125 Neb. 210, 249 N. W. 552.

Also, section 6, art. I of our Constitution, provides: "The right of trial by jury shall remain inviolate," etc. We are

committed to the view that this provision does not create or extend, but merely operates to preserve, the right of jury trial as it existed prior to the adoption of our Constitution of 1875. In other words, it may not be curtailed. *Sharmer v. McIntosh*, 43 Neb. 509, 61 N. W. 727; *Kuhl v. Pierce County*, 44 Neb. 584, 62 N. W. 1066; *Omaha Fire Ins. Co. v. Thompson*, 50 Neb. 580, 70 N. W. 30.

"A jury trial cannot be demanded as a constitutional right in proceedings for the appointment or removal of guardians," in the absence of a statute providing therefor. 35 C. J. 181. See, also, 16 R. C. L. 204, sec. 23.

The general rule seems to be that there is no right to a jury trial in proceedings to determine the question of a person's sanity, except where, as in some jurisdictions, the right is conferred by statute. Indeed, "It is well understood that at common law there was no right of trial by jury in sanity inquisitions." *Sharum v. Meriwether*, 156 Ark. 331, 334, 246 S. W. 501. See, also, *Ex parte Tomlinson*, 1 V. & B. 57; *Crocker v. State*, 60 Wis. 553, 19 N. W. 435; *State v. Linderholm*, 84 Kan. 603, 114 Pac. 857; *In re Brown*, 39 Wash. 160, 81 Pac. 552, 109 Am. St. Rep. 868; *Ex parte Scudamore*, 55 Fla. 211, 46 So. 279; *Hagany v. Cohnen*, 29 Ohio St. 82; *State v. Judge Eighth Judicial District*, 48 La. Ann. 503, 19 So. 475; *In re Bresee*, 82 Ia. 573, 48 N. W. 991; *Black Hawk County v. Springer*, 58 Ia. 417, 10 N. W. 791; *Gaston v. Babcock*, 6 Wis. 502.

"In proceedings not within the application of the constitutional provisions the fact that an appeal is allowed does not entitle the parties to demand a jury, unless the statute so provides." 35 C. J. 195.

The method and effect of appeals in probate proceedings in this state are governed by sections 30-1601, 30-1606, 30-1607, Comp. St. 1929. These are applicable to appeals in actions involving the appointment of guardians. *In re Guardianship of Strelow*, 116 Neb. 873, 219 N. W. 387.

Section 30-1606 provides, in substance, that upon compliance by the appellant with the requirements thereof, the district court "shall be possessed of the action, and shall

proceed to hear, try, and determine the same, in like manner as upon appeals brought upon the judgment of the same court in civil actions." This was enacted in 1881. Our present Code of Civil Procedure, enacted in 1867, expressly abolishes all forms of actions and suits heretofore existing, and provides: "And in their place there shall be hereafter but one form of action, which shall be called a 'civil action.' " Comp. St. 1929, sec. 20-101.

As to the trial of issues arising in the "civil action" thus defined, the controlling terms of our Code are, viz.:

"Issues of law must be tried by the court, unless referred as provided in section three hundred and eight (20-1139) of this Code. Issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury unless a jury trial is waived or a reference be ordered as hereinafter provided." Comp. St. 1929, sec. 20-1104.

"All other issues of fact shall be tried by the court, subject to its power to order any issue or issues to be tried by a jury, or referred as provided in this Code." Comp. St. 1929, sec. 20-1105.

In view of the many questions which are within the civil jurisdiction of county courts (see *Gainsforth v. Peterson*, 114 Neb. 442, 207 N. W. 935) the statutory language of section 30-1606, Comp. St. 1929, quoted above, does not necessarily imply that the trial of an appeal from the probate court will of necessity involve a jury trial. Remembering the fact that our Civil Code is, at least in a degree, applicable to all our courts, it is obvious that the interposition of a jury is mandatory only when the inherent nature of the issues to be determined, in the light of constitutional and code provisions quoted, or the express terms of statutes which may be involved, so require. This as a principle of procedure has by implication at least been approved by this court in its application of the provisions of section 30-1606, Comp. St. 1929.

Thus, in *Sheedy v. Sheedy*, 36 Neb. 373, 54 N. W. 560, where the matter involved was the payment of an allow-

ance out of an estate to the widow, it was held error to refuse a jury trial on appeal.

And in the case of *In re Estate of Maag*, 119 Neb. 237, 228 N. W. 537, it was determined: "An appeal from the refusal of the county court to make an allowance out of the estate of a deceased husband for the support of his widow is a law action and is triable to a jury unless a jury be waived."

But, in the case of *In re Estate of Scott*, 76 Neb. 28, 106 N. W. 1003, we announced the rule, viz.: "Upon appeal to the district court from an order appointing an administrator, the issue presented by the appeal is one for the court, and should not be submitted to a jury."

Again, in the case of *In re Estate of Wilson*, 83 Neb. 252, 119 N. W. 522, there was presented the question of proper compensation for an administrator, and the court, while not unanimous on other questions involved, without dissent announced the principle that "in the district court the claim should have been tried without the assistance of a jury."

In the instant case, it is manifest that the controlling issue involved is not within the protection of section 6 of our Bill of Rights. Further, it is not an issue arising in an action for the recovery of money or of specific real or personal property, and neither in the court of original jurisdiction nor in the appellate court is there any statute which specifically directs a jury trial. The issues become triable by a jury only in the exercise of the discretionary power of the district court to "order any issue or issues to be tried by a jury." Comp. St. 1929, sec. 20-1105. This, indeed, constitutes our Civil Code authorization of the submission of issues to a jury in suits in equity, and, likewise, in the proceeding now being reviewed; in both it being a matter of discretion and not a matter of right.

"In suits not triable by jury as of right, a verdict of a jury is advisory only." 25 Standard Ency. of Procedure, 1053. In other words, "In suits in which a trial by jury is not expressly provided by statute, the verdict of a jury is advisory only (*Peterson v. Estate of Bauer*, 76 Neb. 652,

661, 107 N. W. 993, 111 N. W. 361) and the court is under no legal obligation to abide by it (*Bank of Stockham v. Alter*, 61 Neb. 359, 85 N. W. 300; *Foxworthy v. Colby*, 64 Neb. 216, 89 N. W. 800). The chancellor in reaching a final conclusion may modify the verdict, reject it *in toto*, or render a decree contrary thereto. The verdict of a jury is not the sole basis of a decree, but the decree must be made as the result of the chancellor's judgment upon the evidence, aided merely by the jury." 14 Standard Ency. of Procedure, 536.

The conclusion supported by the record in the instant case is that, the issues involved not being triable to a jury as a matter of right, the verdict returned therein is not to be deemed conclusive, but treated as advisory only, and the ultimate responsibility for the determination of the facts involved rests with the trial judge and not with the trial jury.

Therefore, in this proceeding, as in appeals in jury trials in equity cases, "Error cannot be predicated upon instructions given or refused by the court. In determining the correctness of the findings in a suit, the appellate court does not review the instructions, but considers the evidence introduced on trial in order to decide the cause on its merits." 14 Standard Ency. of Procedure, 536.

For, it is also a well-established rule of procedure in this state that "Reversible error cannot be predicated on the admission of incompetent or immaterial evidence in equity cases. The trial court is presumed to have disregarded any such evidence." *Lancaster County v. Graham*, 120 Neb. 785, 235 N. W. 338.

In this class of cases, notwithstanding the interposition of a jury in an advisory capacity, the issues involved are ultimately determined by the court, and the final judgment entered herein is within the protection of the rule that, in a case tried to the court, the presumption obtains on appeal that the court, in arriving at a decision, will consider such evidence only as is competent and relevant, and this court will not reverse a case so tried because other evidence was

admitted. *Miller v. Banner County*, 127 Neb. 690, 256 N. W. 639; *American Surety Co. v. First Trust Co.*, 124 Neb. 874, 248 N. W. 697; *McCarter v. Cover*, 122 Neb. 691, 241 N. W. 525; *Hartford v. Pinnie*, 128 Neb. 771, 260 N. W. 371.

The result of the application of the rules of procedure above discussed to the record in the instant case is to reduce the controlling questions for our consideration to two, viz.: (1) The sufficiency of the petition to state a cause of action; and (2) the sufficiency of the evidence to sustain the judgment entered.

As to the sufficiency of the petition, the substance of this pleading is set forth in the first paragraph of this opinion. Even if all reference to the minor dependent children contained therein be deemed surplusage and be excluded from consideration, ample allegations remain which set forth all the required statutory elements essential to the sustaining of the proceeding. In it are set out allegations that "Leo M. Warner, an inhabitant of and residing in Polk county in the state of Nebraska, is mentally incompetent to have the charge and management of his property," and that he is the owner and possessed of certain real and personal property of an alleged value situated within the jurisdiction of the court. It is clear that the pleading attacked states a cause of action, and the technical objections thereto are not well taken. Comp. St. 1929, secs. 38-201, 38-202.

In consideration of the question of the sufficiency of the evidence to support the judgment entered by the district court, the first matter requiring attention is the record of proceedings had in the county court of Polk county, Nebraska, entitled, "In the Matter of Guardianship of Leo M. Warner, an incompetent person," which were instituted by the filing of a petition by Leo M. Warner on March 29, 1929. It was offered in evidence by the petitioners in the district court, and admitted in evidence over the defendant's objection that "the county court of Polk county, Nebraska, did not have jurisdiction * * * of said subject-matter, or of the person of the defendant, and that the same * * * are

incompetent, irrelevant and immaterial." This is, in effect, a collateral attack on the judgment offered.

"A collateral attack on a judicial proceeding is an attempt to avoid, defeat, or evade it, or to deny its force and effect in some manner not provided by law. * * * When a judicial order, judgment or proceeding is offered in evidence in another proceeding, an objection thereto on account of judicial errors is a collateral attack." Van Fleet, Collateral Attack on Judicial Proceedings, 5.

In the present case Leo M. Warner is not charged with insanity, but alleged to be incompetent. In support of this issue the general rule appears to be: "The acts and conduct of a party from his boyhood up are admissible to illustrate his condition of mind at the time of the trial; and so, of course, his sayings, and manner of talk and conversation, as furnishing the best evidence of his mental condition." Woerner, American Law of Guardianship, 411.

We are committed to the rule that, "In a proceeding for the appointment of a guardian for alleged incompetency because incapable of caring for his property, where the person is a party to the proceeding and has not been adjudged insane, his admissions, declarations, and showing of facts inconsistent with mental soundness are admissible as substantive evidence on the issue of sanity." (And this same rule was applied to the decision of the issue of competency.) *Keiser v. Keiser,* 113 Neb. 645, 204 N. W. 394.

The record objected to is a proceeding resulting in an appointment of a guardian for Leo M. Warner as an incompetent. It was commenced by a petition filed by him in the county court of Polk county, Nebraska, on March 29, 1929, as hereinbefore stated. This pleading is both subscribed and sworn to by him, in which it is alleged that the petitioner "is incompetent to handle his business affairs; that he is possessed of personal estate situate in the state of Nebraska of the estimated value of $400 and of real estate of the estimated value of $3,000 net; that it is necessary that a guardian should be appointed for the purpose of taking care of his interest in said estate." A guardian is

therein nominated, whose appointment is prayed for. This record further discloses that upon the filing of this petition, by order of the county court then made and entered, the cause was set down to be heard on April 15, 1929, and it was further ordered "that notice of said hearing be personally served on the said Leo M. Warner fourteen days prior to the said day of hearing." A proper notice of the pendency of said petition thereupon issued out of said court and was personally served on Leo M. Warner by the sheriff of Polk county on March 29, 1929. On April 15, 1929, pursuant to the notice served, a public hearing was had, as by law provided, in the county court of Polk county, the petition sustained, and the prayer thereof granted; and Frank W. Warner was adjudged "a suitable person to have the care and custody of the person and management of the estate of said Inc. (Incompetent), and it further appearing that a guardian should be appointed," the said Frank W. Warner was thereupon appointed, and he took oath, gave bond, and entered upon his duties as such. Said Frank W. Warner continued to serve in that capacity until the personal estate coming into his possession had been lawfully paid out and applied and thus wholly exhausted. Thereupon he filed a final report, together with his resignation. The final account was duly approved by the county court, and the resignation accepted, and Frank W. Warner was discharged as guardian. The irregularities in this record, on which the quoted objections are based, are, viz.: The omission of the word "mentally" (incompetent) in the complaint; the fact that the petition was signed and verified by an incompetent and not by his "relatives or friends," as required by section 38-201, Comp. St. 1929; and the fact that the petition does not disclose that he was a resident and inhabitant of Polk county and owned property situated therein.

The evidence in the instant case discloses that he was then a *bona fide* resident and inhabitant of Polk county, Nebraska, and the owner of personal property situated therein.

Webster's New International Dictionary (2d ed.) defines "incompetent" as, viz.: "One who is incompetent, as one incapable of managing his affairs because mentally deficient or undeveloped; as, children and idiots are incompetents in the eyes of the law; one incapable of doing what is properly required; as, these men are *incompetents.*"

The defendant relies on *Brandeen v. Beale,* 110 Neb. 686, 194 N. W. 787, to sustain his contentions. Unexplained this case might be deemed to furnish some support for his argument. But when the controversy came before this court a second time, our opinion was reported under the title of *Brandeen v. Lau,* 113 Neb. 34, 201 N. W. 665. We not only determined that it was wholly unnecessary to amend the petition before the court in *Brandeen v. Beale,* 110 Neb. 686, 194 N. W. 787, but that the original petition was ample to vest the county court with jurisdiction. The following excerpts disclose the gist of our second opinion of that case, viz.:

" 'The sufficiency of the petition,' in a court of record, 'is not a test of jurisdiction, as the court may commit an error in holding it sufficient; but this, if the court had jurisdiction, will not render the judgment subject to collateral attack.' *Taylor v. Coots,* 32 Neb. 30.

"The omission of an allegation of a jurisdictional fact, in a judgment of a court of record, is cured by proof of the existence of such fact, and where, in such court, a judgment is rendered, and is silent with respect to a jurisdictional fact, it will be presumed that the court acted within its jurisdiction. Woerner's American Law of Administration (3d ed.) secs. 143-145.

"Jurisdiction of the subject-matter, in a court of record, is to be tested by the authorized extent of the powers of the court in respect of the cause of action before it. Woerner's American Law of Administration (3d ed.) sec. 144.

"In a court of record, it is not essential that every jurisdictional fact appear upon the face of the record, and if a petition sets out facts sufficient to show a cause of action within the general jurisdiction of the court, and no facts

appear upon the face of the record establishing that no jurisdiction exists, all presumptions are resolved in favor of the power of the court to act."

These doctrines were, in effect, upheld and the third decision (a Commissioner's opinion) of *Brandeen v. Beale*, No. 25436 (not officially reported), was made in harmony therewith, as also was the final determination of the matters in dispute in that case made by this court in *Brandeen v. Beale*, 117 Neb. 291, 220 N. W. 298.

Indeed, this result is quite in harmony with the doctrine announced by this court in the early case of *Seward v. Didier*, 16 Neb. 58, 20 N. W. 12, wherein it was determined, viz.: "Where a petition for the appointment of a guardian for a child six or seven years of age was signed in the name of the child, and a guardian was appointed and gave bond, etc., *held*, sufficient to give the court jurisdiction."

"The rules as to collateral attack are applicable with full force to proceedings in rem and quasi in rem, such as adjudications of insanity. * * *" 15 Standard Ency. of Procedure, 400. See, also, *Wirsig v. Scott*, 79 Neb. 322, 112 N. W. 655.

It follows that the county court of Polk county had jurisdiction both of the subject-matter and of the person of the defendant Warner in the proceeding begun March 29, 1929, and upon collateral attack, its judgment and proceedings therein were entitled to full faith and credit, and were properly admitted in evidence by the trial court. *Herter v. Herter*, 97 Neb. 260, 149 N. W. 795; *Holliday v. Shepherd*, 269 Ill. 429, 109 N. E. 976; *Spiers v. Hendershott*, 142 Ia. 446, 120 N. W. 1058; *Chase v. Spencer*, 150 Mich. 99, 113 N. W. 578; *McAllister v. Rowland*, 124 Minn. 27, 144 N. W. 412.

Indeed, this judgment of the county court of Polk county having been entered granting Leo M. Warner the relief expressly designated in his petition, it is not subject to attack by him or in his behalf. 4 C. J. S. 404, sec. 213; *Schoren v. Schoren*, 110 Or. 272, 222 Pac. 1096; *Weander v. Johnson*, 42 Neb. 117, 60 N. W. 353; *Miller v. McGannon*, 79 Neb. 609, 113 N. W. 170.

In determining the sufficiency of the evidence to support the findings and judgment of the district court, appealed from, there are certain facts as to which no serious conflict is to be found in the proof. The defendant was 43 years of age. He had inherited approximately $5,000 in cash, of which he was about to come into possession. He is, and was, without doubt a moron, and his present degree of intelligence and mental competency has existed and remained unchanged for more than twenty years past. The question in fact is not whether the defendant is of impaired mentality, but the degree of mental impairment was for determination by the trial court. On this subject two expert "medical" witnesses testified in behalf of the defendant, and without substantial disagreement classify his degree of mental competency as the intelligence of a child between ten and twelve years of age. The evidence as to the determinative tests is that Warner was unable to perform those of a twelve-year-old child, but was able to successfully carry out the test for the next grade thereunder. These experts, on the basis of their test and observation, testify to the opinion that the defendant is not mentally incompetent to have the charge and management of his property. "It is obvious, however, that the opinions of even medical experts, though worthy of the most careful consideration, and respectful attention, and to be weighed with other testimony in reaching a conclusion, cannot and ought not solely to control the court or jury in the opinion they are to pronounce on the facts before them." Woerner, American Law of Guardianship, 410.

In addition, as lay witnesses, we have relatives and close acquaintances of the defendant, who, in testifying, detail facts and circumstances relating to the conduct and life of defendant, on the basis of which they testify to opinions that the defendant is mentally competent to have charge and management of his property.

Opposed to this proof, we have the evidence of members of his father's family, and others, who, likewise from the basis of observation, which the situation in which they

lived and contact with the defendant accorded them, testify to the opinion that the defendant is mentally incompetent to have charge and management of his property. The facts testified to by certain of these witnesses tend to support the conclusion that the defendant was never competent to, and did not, transact the important business transactions arising during his life; that so long as his father lived he transacted most of the defendant's important transactions for him; that finally, in the year 1929, defendant's mother, and his brothers and sisters, requested Dr. Frank W. Warner, a brother of the defendant, to handle the business and property of Leo M. Warner, the defendant. Circumstances appearing in the record indicate that Dr. Warner complied with these requests, and undertook the duties contemplated thereby. The record shows that it was at this time that the petition for the appointment of Dr. Frank W. Warner as his guardian was filed by the defendant, the signed consent of Dr. Warner to such appointment being indorsed thereon. It is further disclosed by the record that Dr. Warner duly qualified and continued to serve as such guardian until all moneys and personal property then belonging to the ward and coming into his possession as guardian had been disposed of as provided by law and the orders of said court, whereupon his resignation as such guardian was presented to and accepted by the county court, and he was thereupon on June 29, 1936, discharged as such. However, it appears that this order of the county court of Polk county neither expressly nor by implication in any manner changed or modified its determination as to the mental incompetency of defendant as necessarily made and determined in its order of April 15, 1929.

However, the conclusiveness of this evidence need not be determined. So considered, it is clear that the presiding judge in the district court accepted the testimony given in behalf of the plaintiffs and rejected the testimony offered in behalf of the defendant. The trial judge heard the testimony of Leo M. Warner and of the witnesses testifying in his behalf, and also the witnesses testifying for the peti-

tioners. The demeanor of defendant's witnesses was necessarily observed by him, as well as those who testified adversely to the defendant. He accepted as true and correct the testimony of plaintiffs' witnesses and similarly rejected the testimony in behalf of the defendant. The trial judge's opportunity for thus ascertaining the truth was greater than that afforded the members of this tribunal.

In consideration of the entire record, we are impressed with the view that this case was correctly determined. The judgment of the district court is, therefore, in all things,

AFFIRMED.

SIMMONS, C. J., dissenting.

This is an appeal from a decree of the district court holding that Leo M. Warner is incompetent to have the care and management of his property, and affirming and sustaining the findings of the county court to the same effect.

The petitioners, applying for the guardianship, are Robert and Hazel Richardson. Hereafter reference will be made to the petitioners as the plaintiffs, and to the alleged incompetent as the defendant.

The defendant is a man 43 years of age. The plaintiffs are his nephew and niece. The mother of the plaintiffs (sister of the defendant) is dead. As nearly as can be determined from the record, the plaintiff Robert Richardson is a resident either of York or of Polk county. The plaintiff Hazel Richardson is a resident of Holt county, and their father is a resident of either Holt or Boyd county, Nebraska.

The defendant was married in 1923. There are three children. In 1929 the wife sued the defendant for divorce. The decree in full is not in evidence, but it appears that she secured the divorce, and custody of the children was placed in the hands of third parties, at the expense of the defendant.

At the time the divorce proceeding was pending, the defendant, upon the advice of his brother and attorney, filed a personal application in the county court, alleging that he was incompetent, and asking to have a guardian appointed

for him. As a result of that application, and apparently without notice to any one except the brother, Dr. Frank Warner was appointed his guardian. Further reference to that proceeding will be made hereafter.

It is in evidence, and not denied, that the purpose of that guardianship was to protect the defendant's property from claims of the wife. The guardianship proceedings, which were admitted in evidence over the objection of the defendant, clearly sustain the contention of the defendant in that regard. They show that immediately following his appointment the guardian reported that he had in his possession certain personal property consisting of farm machinery, horses, feed, and household goods valued at $527; that between the time of the guardian's appointment and March 7, 1930, the guardian received a total of $798.54 cash. Of this, $197 was from money turned over to the guardian by the defendant, reference to which will be made hereafter. The balance came from the sale of the property, machinery, and oats belonging to the defendant. There was paid out during the first year of the guardianship a total of $629. Of that amount, $590 was paid either to the clerk of the district court, or to others, as alimony and child support. The guardian shows a receipt of $3 on May 31, 1930, and no further receipts. The last payment was made on March 23, 1931, and thereafter no further action was had, no money received, or paid out, until June 23, 1936, when the guardian reported a balance of $45.47 which he had had on hand, and which was paid out in court, attorney, and guardian fees and expenses.

The defendant testified in this action that his wife was extravagant (and in that his testimony is supported by other witnesses) and that his wife was unfaithful to him. He denied the paternity of the three children.

The defendant inherited real and personal property from the estate of his parents. In the probate proceedings of his mother's estate, there was over $800 payable to him, which was paid into court by the administrators of that estate, and held by the court. A partition action was brought by a

sister, and his one-eighth interest in the real estate which he had inherited was sold. Over $4,000 is held by the clerk of the district court as defendant's share of the proceeds of the partition sale.

It appears that, shortly after the divorce action, custody of two children passed as a matter of fact to the father of the plaintiffs. The third child appears to be with an aunt, apparently on the mother's side.

In April, 1937, the father of the plaintiffs herein filed an action against the defendant in the district court for Polk county, asking for the recovery of a substantial sum for the care of the two children. Thereafter a conference was held in Holt county between the two plaintiffs and their father, and it was determined that a petition should be filed asking that the defendant be placed under guardianship. At that time, the defendant had a brother and a sister living in Polk county, and a brother and a sister living nearby in York county. They were not consulted, and were not present at the family meeting when the plaintiffs determined to file the petition in this action. The brothers and sisters did not ask that it be filed. The plaintiff Hazel Richardson did not testify. Neither did the father. Plaintiff Robert Richardson testified that his reasons for filing the petition were that he knew the defendant had money coming to him, that he wanted to see the children cared for, and that he believed the defendant to be incompetent. He was asked twice who prepared the petition in this case for him, and he answered, "An attorney." He did not name the attorney until his attorney instructed him to do so. On cross-examination, he admitted that his father's claim against the defendant, then pending in court, "might have had something to do with" his filing of the petition. However, he denied that his father, or any one else, asked him to file the petition, although he did talk with his father about it. Plaintiff further admitted that his action in this matter was "partly" guided and controlled by the hope that his father would prevail in that litigation. One of plaintiff's attorneys was the county judge before whom the first guardianship

proceedings were had. Plaintiff's attorneys represented the father in his case against the defendant, and they now represent the plaintiffs in this action, who, the petition alleges, are the relatives and "friends" of the defendant.

As to the children, plaintiff Robert Richardson testified that two of them had been living with his father for seven years; that the defendant had never come to see them, written them, sent them gifts or cared about them; that his father was not physically able to continue to care for them and intended to return them to their father (*the alleged incompetent.*)

Robert Richardson also testified that in 1935 he bought a stock tank from the defendant and paid him $4 for it; that it was in good condition; that the value of *a new tank* at that time was $12.50, and that the defendant fixed the price on the tank. That is one of the acts of alleged incompetency of the defendant.

The other act of alleged incompetency, testified to by the plaintiff, was that at one time the defendant, who was then living with his sister, drove her car to the near-by town of Shelby, left it there on the street with the ignition locked, did not advise his sister where the car was, and did not return home until several days later. The sister, testifying for the defendant, explained that she was concerned only as to where the defendant and the car were.

Upon those two acts, plus his observations and associations with the defendant, the plaintiff was permitted to testify that the defendant is incompetent.

A brother of the defendant testified, for the plaintiffs, that, while living, the father took care of all defendant's business, then the mother did so, then a brother, Glen, now deceased, and, finally, Dr. Warner helped the defendant with his business; and that he wanted the boys to have some of the money. The witness himself never had anything to do with defendant's business and never was with him when he transacted it, but observed his actions. He testified that the defendant worked for him on a number of occasions, but was not good help because he would "quit for no good

reason that I know." He admitted that the defendant understood the value of a dollar and knows what is going on. He testified that he did not think the defendant knew the value of an automobile; that the defendant had traded cars and horses upon occasions; that he (the witness) did not know anything about these trades as to prices, values, and exchange conditions. When asked if he knew what his brother was going to do with his money if he got it, he replied that, in the summer of 1937, two men came to his place seeking the defendant, and that "they were out to sell a trailer house." There is nothing further in the record to show that the men ever attempted to sell the defendant a trailer, or that he ever bought one. On those facts, plus his general observations of the defendant, Ray Warner testified that he thought the defendant was incompetent.

It appears from the defendant's witnesses that at one time the defendant did quit working for his brother Ray. Two of the witnesses testified that the reason was that the brother Ray did not pay the defendant for the work which he had been doing.

Plaintiffs also called as a witness the brother, Dr. Frank Warner (a dentist), who testified by deposition. He also testified that the father, while living, transacted most of the defendant's business, and that from 1929 to 1936 he (the witness) handled the business and the property of the defendant at the request of his mother, brothers, and sisters; and, during that time, he sold the defendant's farm machinery and household property. Based upon the business which he transacted for him and observations of him, it was the opinion of Dr. Warner that his brother was incompetent to control and manage his property and that he was easily influenced. However, he admitted that he had not been associated with his brother enough to know if he had squandered his money, and that he did not know of any one who had ever influenced him to do anything that was not right. In his testimony, Dr. Warner did not refer to the first guardianship proceedings wherein he was appointed guardian. However, his testimony covered the

period of his guardianship, and during the period of time Dr. Warner was acting as guardian, from April, 1931, to June, 1936, he transacted no business whatever for the defendant. He did not testify as to any business which he had transacted. His sworn statement before the county judge recites that in that statement he had accounted for all of the estate of defendant that had come into his "possession," or to his "knowledge."

The present county judge was permitted to testify that he had known the defendant since 1927; that he had casually met him in and about the bank, courthouse, and on the street, observed him, and had an opinion as to his competency, and that he entered an order in the county court in August, 1937, placing a guardian over the property and person of the defendant. He recited no facts whatever upon which either his opinion or the order is based.

Plaintiffs offered the testimony of an attorney, who was counsel for the defendant in his divorce action. He also represented Mrs. Dickson in the partition suit. He saw the defendant and was present many times in conferences regarding the estate. In May, 1936, they had a series of conferences, one of which occurred on the street in Osceola. The sister was in a car; the witness standing beside the car talking to her. The defendant was sitting down, leaning over with an elbow on the curb and his limbs out in the street. He talked with them about the partition suit and his share in the property. Upon the basis of that testimony, plaintiffs contend in their brief "that on one occasion he (the defendant) was seen lying in the gutters of the streets in Osceola." The attorney was asked the foundation question, but not permitted to testify as to his opinion of the competency of the defendant. On cross-examination, he testified that he recommended to the defendant's two sisters (who testified for the defendant) that they have a guardian appointed for the defendant. One of the sisters testified that they refused to bring the guardianship proceeding against the defendant.

Defendant was called as a witness for the plaintiffs and

was cross-examined. He testified as to his age, the school which he had attended, the names of his teachers. He attended school for 14 years, and left school when he was in the seventh grade at the age of 19 to help his father on the farm. He left home at the age of 23. He had asked in 1936 about the money which he had coming from his mother's estate, and had not asked about it since, although he clearly knew that he had it coming; that he had a one-eighth share in the real estate; that he had earned $75 in 1937; that he read books, daily newspapers (naming two of them), novels, and magazines. He told when he was married, of his married life, that he treated the family all right, provided for them, and claims that no one had assisted him in business matters; that he bought a car in 1930, paid for part of it in day labor, financed the balance of it, and that Dr. Warner had paid that balance. (This testimony about the payment for the car out of defendant's money is established by Dr. Warner's report in the guardianship proceedings.) He frankly admitted that while he was farming for himself he was not able to secure the same farm for the second year. When asked what he intended to do with his money if he received it, he replied that he intended to pay his bills and put the rest of it in government bonds. When asked what interest government bonds paid, he said he did not know exactly. While on the stand subject to this examination, he was asked to figure 4½ per cent. interest on $4,000 for a year. He was unable to reach the correct answer.

Plaintiffs offered no expert witnesses. Defendant called as a witness Dr. A. E. Bennett, of Omaha, a specialist in mental and nervous diseases. He had examined the defendant, who told him that it was his desire to remove guardianship proceedings pending against him, and that his relatives wanted to get his money. At this examination he was accompanied by his sister. He told of his disagreement with his wife, and said that he had accepted the guardianship on the advice of a brother and an attorney for the reasons herebefore set out; that for a year and a half he

turned his wages over to his attorney, and that after that he had managed his own affairs; that his brother resigned as guardian in 1936; that in 1937, when he was to get this other money, the relatives were trying to prevent it.

Dr. Bennett testified that his statement with reference to why the guardianship proceedings were brought was a normal reaction; that the defendant had a poor grasp of general information; that he did not have the grasp of the "higher intellectual group;" that he had no delusions, no defective memory, no disturbances in mental retention; that he was poor in calculation and simple arithmetic; that his mental age was between 10 and 12; and that in his opinion, based upon the examination which he made and the information furnished by the defendant, the defendant was competent to have charge of and manage his property, and use ordinary intelligence and discretion with reference thereto; that he had a "moderate degree of intelligence retardation, which is well within the normal averages for a great many individuals who are self-supporting and able to adjust themselves at the level that he is called upon to adjust himself to;" that he was a "high-grade moron;" that he was more susceptible to influence than those of a higher mental rating, but that there were plenty of such individuals of his mental capacity who handle their own affairs, and while he might at times require some guidance in the management of his property "most of us do;" and that it was nothing unusual for people in that class to handle larger sums of money than $5,000, and that brilliant men often dissipate property more easily than the less brilliant.

Defendant also offered the testimony of Dr. J. S. Bell, of York, a general practitioner and surgeon. He testified that he had examined the defendant; that the defendant's mental capacity is a little below the medium grade of intelligence, but more than a ten to twelve-year-old child; that he was able to handle his own affairs with ordinary discretion; that he would not be generally guided by persons of stronger minds, nor more likely to be influenced "than any of the rest of us."

Seven of the defendant's neighbors also testified for him. They had known him for an average of 20 years or more. They were not interested in the outcome of the litigation. Some of them had worked with him. He had worked for some of them. All testified that he was a good worker; that he knew about his wages and had no extravagant habits. Several testified that, with the defendant, they had attended horse sales and sales of other types of property, and that the defendant's judgment was good; that he was as capable as the majority of people; that they knew of no reasons or facts upon which a charge that he was incompetent could be based. Testifying also for the defendant were his nephew and brother-in-law. They were with him on some of his car and horse trades; and, in their opinion, he received good value in these trades; and was fully competent.

His sister, with whom he is now living, testified for him that he had traded cows for her; had purchased property for her at sales; that he handled property in a very satisfactory way, and that he was as competent as any one of them to handle the property he would receive from the estate.

His other sister, Mrs. Dickson, also testified. Corroborating the other witnesses, she testified that in her opinion he was perfectly competent to manage and control his property. She was the plaintiff in the partition suit that was started in February, 1935. On cross-examination, it was pointed out that, in that petition which she signed, her brother was designated as an incompetent. She testified that that was done by the attorney, who told her that it was necessary to so designate him because of the guardianship proceedings and its effect upon the title of the property; that the guardian originally was appointed for him because of the divorce action, and that as long as it was pending it was necessary that he so be designated. She was also one of the administrators of her mother's estate. She testified she paid the money into court because the attorney and the county judge advised her that should be done. That also was not denied. She testified that she was appearing for her brother because she wanted him to get "a fair deal."

Called in rebuttal, the witness, Ray Warner, was asked further about the horse trades and testified that upon one occasion the brother had gotten a horse in a trade that was a "kicker."

It will thus be seen from an examination of this testimony that the factual basis of defendant's alleged incompetency is distinctly meager. With the exception of those incidents, the only supporting evidence upon which a finding of incompetency is based is the testimony of the plaintiffs' witnesses based upon general observations of the defendant, and the allegedly void guardianship proceedings.

There is no evidence in this record that the defendant was ever extravagant, wasteful, or careless with his money. There is no evidence that he was ever overreached or improperly influenced or deceived or imposed upon, unless it should be when he accepted the advice of his brother and attorney and personally asked that a guardian be appointed for himself.

The plaintiffs argue in their brief in this court that he has done little, if anything, in the last several years; that in 1937 he earned but $75. It may be pointed out that as a result of the guardianship proceeding in 1929, and the sale of his farm equipment, he was left without money or property to enable him to operate a farm. Subsequent to that time, it appears that he has, through labor for neighbors and relatives, earned his own way and cared for himself.

The extent to which his doctor brother thought defendant was incompetent to handle his business affairs is demonstrated by the guardianship proceeding. The guardian brother in that report shows that during the period from April 13, 1929, to September 20, 1929, the defendant paid to the guardian a total of $197, an average of almost $40 a month. Evidently the guardian allowed the alleged incompetent to collect his own wages. During the period from April 15, 1929, to April 9, 1930, a total of $23.40 was paid out of those funds for clothing for the defendant. Subsequent to that time, although the defendant continued to

work, accumulate property, make automobile and horse trades, etc., the guardian did not exert any control over his wages or over his property. After April 9, 1930, the guardian reports the receipt of but $3, and after April 23, 1931, the guardian neither received nor paid out anything until he made his final report in June, 1936. The partition suit, involving the brothers and sisters, was started in 1935. At that time, the first guardianship in Polk county had not been closed and the guardianship was in force. The mother's estate was then being probated, out of which a substantial amount of money became due the defendant. In the face of those facts, the defendant's brother, Dr. Frank Warner, made his final report, petitioned for his discharge as guardian, and did not ask that any one else be appointed guardian in his stead, and no one else was appointed in his stead.

It was not until after plaintiffs' father attempted to secure a judgment against the defendant that the plaintiffs, without consultation with the brothers and sisters of the defendant, initiated this guardianship proceeding. It is obvious that the conclusion of the defendant that some of his relatives wanted to get his money was a rational conclusion.

All persons are presumed to be sane and competent. An individual is entitled to the control of his own property unless good cause is shown for denying that control to him. *Keiser v. Keiser,* 113 Neb. 645, 204 N. W. 394. The burden of proof was upon the plaintiffs to establish that the defendant was "mentally incompetent to have the charge and management of his property." Comp. St. 1929, sec. 38-201. Woerner, American Law of Guardianship, 408, sec. 124. *In re Phillips,* 158 Mich. 155, 122 N. W. 554.

The Nebraska statute and the Michigan statute are in almost identical language. This court has often cited and followed the Michigan court in interpreting our guardianship act. *Mental* incompetency must be established. "The statute does not say merely 'incompetent,' but 'mentally incompetent.' It does not refer to persons who are sane, but

not, perhaps, as wise or intelligent as some other persons. It applies to those whose mind is so affected as to have lost control of itself to such a degree as to deprive the person afflicted of sane and normal action." *In re Guardianship of Storick*, 64 Mich. 685, 31 N. W. 582. Here it is noted that the plaintiffs' witnesses were not limited by their questions to the mental incompetency or incompetency of the defendant, but were asked merely as to their opinion of defendant's competency.

The power, vested in the courts, to place a guardian over a person or his property should not be exercised except in cases that clearly require that action. 32 C. J. 632; *In re Guardianship of Wilson*, 23 Ohio App. 390, 155 N. E. 654; *McCammon v. Cunningham*, 108 Ind. 545, 9 N. E. 455; *In re Bryden's Estate*, 211 Pa. St. 633, 61 Atl. 250.

It was early held in Michigan: "The fact that a man is unable to provide a comfortable and suitable maintenance for his family, even when coupled with the fact that he makes foolish bargains and squanders all he earns, is not made by either statute a reason why he should have a guardian appointed over him. If it were, a goodly number of people would be under guardianship. * * * The power of appointment of a guardian by the probate court is derived from the statute, and, in order to obtain jurisdiction in such cases, the statute must be strictly pursued." *Partello v. Holton*, 79 Mich. 372, 44 N. W. 619. See *North v. Joslin*, 59 Mich. 624, 26 N. W. 810; *In re Guardianship of Bassett*, 68 Mich. 348, 36 N. W. 97; *In re Guardianship of Storick*, 64 Mich. 685, 31 N. W. 582.

"An improvident business transaction may be competent evidence in support of an application for guardianship; most of the acts of a respondent in such a case are competent as going to show the mental condition. *But such an improvident act becomes cogent proof of mental incompetency only as it is reinforced and explained by other facts and circumstances.*" (Italics mine.) *In re Chappell's Estate*, 189 Mich. 526, 155 N. W. 569.

In *Keiser v. Keiser, supra,* this court said:

"*It is not sufficient that incompetency alone is established,* for it may well be, even where incompetency exists, that the situation and surroundings of the incompetent are such that no necessity exists for the appointment of a guardian, and that no good purpose would be served thereby. * * * But the present proceeding is under a statute, one of whose purposes is, indeed its chief purpose is, to prevent the necessity of such actions; and, while each individual is entitled to control his own property, the legislative intent was to prevent its dissipation in litigation over contracts secured by improper persons through improper means and *to save to the owners of such property* that which age and disease have made them unable and incapable to save for and to themselves. (Italics mine.) * * *

"Mental incompetency or incapacity is established when there is found to exist an essential privation of reasoning faculties, or when a person is incapable of understanding and acting with discretion in the ordinary affairs of life."

The real cause for the bringing of this proceeding is the desire of plaintiffs to aid their father in the collection of an alleged claim against the defendant. Guardianship proceedings are not intended to be a substitute for attachment or proceedings in aid of execution. Courts have repeatedly condemned the bringing of proceedings of this character by expectant heirs, for the purpose of conserving an estate for their inheritance. This proceeding presents a situation far more subject to condemnation. The plaintiffs herein are dominated by the selfish interest of aiding their father in the collection of a claim, rather than the unselfish interest of friends having the welfare of the defendant uppermost in their minds. Nowhere in this record is there any evidence indicating that these plaintiffs have ever been concerned about the defendant or his welfare.

It may here be pointed out that section 38-201, Comp. St. 1929, authorizes the "relatives or friends" of the alleged "mentally incompetent" person to apply for the appointment of a guardian. The brothers and sisters of the

defendant, living in the jurisdiction of the county court of Polk county, did not apply for this guardianship. While the plaintiffs are legal "relatives," their friendship for the defendant may well be questioned on this record. That the statute contemplates that this action shall be brought by persons friendly to the alleged incompetent is not open to serious question.

"The court will guard with peculiar care the alleged lunatic from interference springing from a hostile motive, and will weigh with more precision the evidence, if the person by whom it is tendered appears to be actuated by a sinister intent." Woerner, American Law of Guardianship, 408, sec. 124.

"Each case involving the guardianship of an (alleged) incompetent person must, of necessity, stand or fall upon the circumstances and evidence shown and the conditions surrounding the transaction." *In re Guardianship of Blochowitz,* 135 Neb. 163, 280 N. W. 438.

After a careful reading of this entire record in the light of the circumstances and conditions therein disclosed, I am convinced that the appointment of a guardian for the person and property of the defendant is not justified and is not authorized by the statute under which this proceeding was had.

In my opinion the judgment of the district court should be reversed and the case dismissed.

MICHAEL J. CORKLE, APPELLEE, V. CHARLES FENTON: LILLIAN GALLEHER, APPELLANT.
288 N. W. 55

FILED OCTOBER 27, 1939. No. 30645.

1. **Negligence.** If the facts proved establish the more reasonable probability of actionable negligence, the case cannot be withdrawn from the jury.
2. ———. While the question of ordinary negligence is one of fact, yet if, on an examination of the entire evidence, only one inference can be drawn, then it is one of law for the court.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Reversed and dismissed.*

Chambers, Holland & Locke and *Hamer, Worlock, Randall & Tye,* for appellant.

Fred S. Martin, O. A. Drake and *McGan & Burbridge, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

PAINE, J.

Plaintiff brings action against two defendants for injuries he received in an automobile accident. The jury return a verdict of $3,000 against each of the defendants. Charles Fenton, defendant, does not appeal. Lillian Galleher, the other defendant, appeals the judgment against her to this court for a reversal.

There is very little dispute between the parties as to the facts in issue, and they may be briefly stated as follows: The plaintiff, Michael J. Corkle, is 43 years of age, and was employed by the Starr Live Stock Commission Company, and lived in Omaha. He was driving west to Farnam, Nebraska, and had stopped in Grand Island for dinner. At a little after 1 o'clock on July 30, 1937, he was driving west in his 1936 Plymouth coupé on the Lincoln Highway, being No. 30, about two miles west of Wood River, Nebraska, where the highway runs nearly straight, parallel with the Union Pacific track. He felt that his car was weaving a little, and looked both ways and, seeing no car very close, he stepped out on the pavement and found that a rear tire was about half down. He got back in the car and drove entirely off the pavement, leaving about a foot and a half to two feet between the edge of the pavement and his nearest wheel. He jacked up the car with his bumper jack, got out his spare tire, and proceeded to change it.

There were cars passing frequently while he was engaged in this work. All of a sudden he heard a crash and a scream, and he saw a car and a truck coming towards him from the

east, both of them hugging right up to the black line in the center of the pavement. When he first saw them they were about 300 feet away. They then bumped together again, and the truck swerved to the north and headed directly for his car, so he jumped and ran towards the front of his car, but was struck by the truck and injured.

The evidence of the two defendants may be briefly stated as follows: Charles Fenton, a farmer, resides in Kearney, and owned a 1937 Dodge truck, in which he was returning from Missouri to Kearney. As he was driving west he noticed the plaintiff working beside his car, and in his opinion the left hind wheel was on the paving. There were no cars approaching from the west right at that spot, and he looked in his rear-view mirror and saw nothing just behind him, and started to pull over to the south after he had honked. The plaintiff stood up and looked at him, and then started to run around the front of his parked car, and at the same instant he heard something go "bing" against the side of his truck. A Chevrolet coupé was right against his front wheel and bumper, and he could not manipulate it. He was trying to keep his car from running against the car parked along the parkway, and just as he passed the parked car the Chevrolet coupé went off towards the ditch, and the truck struck the fender of the parked car slightly, just enough to knock it off the jack. In putting the brakes on hard, the engine stalled, and he was about twice the length of his truck past the parked car, and in the north lane of travel he at once started the engine and drove his truck out on the north shoulder of the road.

The third car involved in this accident was the Chevrolet coupé owned and driven by Miss Lillian Galleher, a teacher in the city schools of Scottsbluff, Nebraska, and riding with her as a guest was Miss Tassie Becker, who had ridden with her from David City. They had stopped at Grand Island for lunch, and had been following the Dodge truck for some distance, between a quarter and half a mile, which reduced their speed to 25 or 30 miles an hour. Miss Galleher looked down the road, saw it was clear, honked her horn,

and started around the truck. While in the south lane of the highway, the truck suddenly turned and bumped into her, causing her to lose control of her car, which started down the bank on the south side and turned over. Miss Galleher was stunned and unable to talk at first. A large number of cars stopped until there was quite a crowd, and a wrecker came from Wood River and took them there. She testified that just after the accident Mr. Fenton said to her: "I just had to do it, lady, or I would have killed that man sure."

The plaintiff made the following charges of negligence in his petition against Miss Lillian Galleher: That she was reckless, careless, and negligent in driving at an excessive rate of speed, to wit, 60 miles an hour, and in failing to warn the plaintiff of her approach; in striking the truck of the defendant Fenton, and knocking the same into and upon the plaintiff, injuring him severely; and, lastly, that Miss Galleher could have seen, or should have seen, the plaintiff in ample time to avoid striking the Dodge truck and knocking said truck into and upon the plaintiff.

Miss Galleher denied these allegations of negligence on her part, and says that she was driving her Chevrolet coupé in a careful and prudent manner.

Miss Galleher testifies that she was going about 40 or 45 miles an hour until she came to the truck. The evidence is that the speed of the truck was not over 25 or 30 miles an hour, and she followed it for a ways, "I looked up the road to see that the road was clear and honked my horn and started around the truck."

While she was in the act of passing the truck, it suddenly turned and swerved to the left across the center line of the pavement and struck her automobile, causing the same to be knocked into the ditch along the south side of the highway.

The plaintiff charges that this court has held: "When separate, independent acts of negligence combine to produce a single injury, each defendant involved therein is responsible for the entire result, even though the negligent

act of any one of the defendants alone might not have caused the injury." *Zielinski v. Dolan,* 127 Neb. 153, 254 N. W. 695.

In *Koehn v. City of Hastings,* 114 Neb. 106, 206 N. W. 19, it is held: "If one suffers injury and damage as the proximate result of the negligence of two others, and the damage would not have occurred but for the negligence of each of such parties, both are liable to the person so injured."

In the case of *Mason v. Reynolds,* 135 Neb. 773, 284 N. W. 257, several of the Nebraska cases are reviewed, and there is a citation from 1 Cooley, Torts (3d ed.) 247, which says: "The weight of authority will, we think, support the more general proposition that, where the negligences of two or more persons concur in producing a single, indivisible injury, then such persons are jointly and severally liable, although there was no common duty, common design, or concert action."

There is no dispute as to this principle of law governing injury caused by the combined negligence of two or more persons, as shown by these citations. However, to apply this principle to the facts in the case at bar, there must first be a preponderance of the evidence showing that each of the parties was guilty of some act of negligence as charged in the plaintiff's petition. The evidence does not support the complaint of driving at an excessive speed, as charged against Miss Galleher.

It is next alleged that she was negligent in striking the truck of the defendant Charles Fenton and knocking it into and upon the plaintiff, by which he was injured, but the evidence in the case at bar is to the effect that Miss Galleher was at all times on the south side of the middle line of the highway, and that the collision between her car and the truck occurred when the driver of the truck, suddenly and without any warning to her, came over several feet past the south line and collided with her car.

It was also charged by the plaintiff that Miss Galleher was guilty of negligence in failing to have seen the plaintiff beside the road in ample time to avoid striking the Dodge

truck and knocking it into the plaintiff. It was the testimony of Miss Galleher and Miss Becker that neither one of them saw the plaintiff's car parked to the north of the highway, or saw the plaintiff himself repairing his tire. If plaintiff had stopped his car on the pavement, and was working on the pavement as he repaired his car, there might be some merit to this charge, but the evidence appears to be that neither the plaintiff, while working on his car, nor his car projected upon the highway, and that the truck, if it had proceeded on its own side of the highway, could have passed the plaintiff with ample space without having gone over the center line of the highway.

At the close of the plaintiff's evidence counsel for Miss Galleher moved the court to direct a verdict in her favor, for the reason that the evidence was insufficient to sustain the plaintiff's cause of action against her, and for the reason that the evidence was insufficient to show that Lillian Galleher was guilty of negligence of any kind, or to show that any negligence on her part was the proximate cause of the accident.

"It is not sufficient that the negligence charged furnishes only a condition by which the injury is made possible, for if such condition causes an injury by the subsequent independent act of a third person, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury." *Steenbock v. Omaha Country Club*, 110 Neb. 794, 195 N. W. 117.

"Issues of negligence are questions for the jury only when the evidence is sufficient to sustain a finding of negligence." *Kelly v. Gagnon*, 121 Neb. 113, 236 N. W. 160.

"It is erroneous to submit a case to a jury and permit a jury to speculate with the rights of a litigant, when no question for the jury is involved." *Smith v. Epstein Realty Co.*, 133 Neb. 842, 277 N. W. 427.

If the facts proved establish the more reasonable probability of actionable negligence, the case cannot be withdrawn from the jury.

It is true that the question of ordinary negligence is one

of fact, but where the disputed evidence is such that only one inference can be drawn, then it is one of law for the court. *Nolan v. Young Men's Christian Ass'n*, 123 Neb. 549, 243 N. W. 639; *Chicago, B. & Q. R. Co. v. Winfrey*, 67 Neb. 13, 93 N. W. 526; *De Griselles v. Gans*, 116 Neb. 835, 219 N. W. 235; *Long v. Omaha & C. B. Street R. Co.*, 108 Neb. 342, 187 N. W. 930; *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb. 642, 54 N. W. 976.

In our opinion, the motion of Lillian Galleher for a directed verdict should have been sustained. It is therefore ordered that the judgment of the district court as to said defendant Lillian Galleher be reversed and the action dismissed.

REVERSED AND DISMISSED.

JOHNSEN, J., not participating.

IN RE ESTATE OF EDWARD P. MEYERS. DOUGLAS COUNTY, APPELLANT, V. ESTATE OF EDWARD P. MEYERS ET AL., APPELLEES.

288 N. W. 35

FILED OCTOBER 27, 1939. No. 30688.

1. **Domicile.** "One's residence is where he has his established home, and to which, when absent, he intends to return. To effect a change of domicile there must not only be a change of residence, but an intention to permanently abandon the former home." *State v. School District*, 55 Neb. 317, 75 N. W. 855.
2. ———. Where the evidence shows that a person has voted for 50 years or more in a certain county and, when absent from such county, either returned in person to vote or voted an absentee ballot, such fact, when taken in connection with all other facts in the case, is convincing and persuasive in determining a person's domicile.
3. ———. Where a person is under the care of physicians and, on account of illness, is unable to stand the rigorous winters of his residence, and, in order to benefit his health, he is required to move to a new place where he may receive the benefit of care by his physicians, such move is merely temporary, even though the actual time spent in the new residence may be long.

4. ———. Where a person, in order to educate his minor child in a private school, moves from one residence to another, the mere fact that he moved to the latter place for such purpose does not usually effect a change of domicile. Such a change is looked upon as temporary merely, even though the actual time spent in the new residence may be long.
5. ———. Evidence examined and *held* sufficient to sustain the finding and judgment of the trial court that the deceased's residence during his lifetime was in Arthur county.

APPEAL from the district court for Arthur county: J. LEONARD TEWELL, JUDGE. *Affirmed.*

James T. English and *Oscar T. Doerr,* for appellant.

Votava, McGroarty & Sklenicka and *Marshall B. Reynolds, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

Edward P. Meyers died August 25, 1938, in the city of Omaha, Douglas county, Nebraska. September 8, 1938, Margaret G. Meyers, his widow, filed a petition in the county court of Arthur county, praying for the probate of her husband's estate and that letters testamentary issue to her as executrix under the will; alleging also that the deceased left personal property in the state of Nebraska in an amount exceeding $100,000. September 29, 1938, Douglas county filed objections to the jurisdiction of the county court of Arthur county to probate the estate, alleging that the deceased was not a resident of that county at the time of his death, but was a resident of Douglas county. Arthur county was permitted to intervene, and, by petition, alleged that the deceased was a resident of Arthur county at the time of his death, and that the county court of Arthur county had exclusive and original jurisdiction of the probate of the estate, praying the objections of Douglas county be overruled. The county court overruled the objections of Douglas county, thus finding that the deceased was a resident of Arthur county, Nebraska, and that said court had jurisdiction to probate the estate. From this order

Douglas county appealed to the district court for Arthur county, which found that at the time of his death the deceased was a resident of Arthur county, affirmed all orders of the county court of Arthur county, and certified the judgment of the district court to the county court of Arthur county for further proceedings. The present appeal is from the order of the district court for Arthur county.

The only issue raised by the appeal is: Do the facts prove residence of the decedent in Arthur county or in Douglas county? Douglas county relies on the facts as shown by stipulation, concisely stated as follows:

Edward P. Meyers leased an apartment, No. 107 St. Regis, located at 621 South Thirty-seventh street in the city of Omaha, and lived at the apartment for a period of time during each year for at least eight successive years. His name was listed in the telephone directory in Omaha, and his name, together with that of his wife, Margaret G. Meyers, was listed in the Omaha city directory during that period of time. He maintained a bank account in the United States National Bank of Omaha, had a safe deposit box in and transacted his banking business with the bank during this period of time. Margaret G. Meyers owned the furnishings for seven rooms in their apartment at the St. Regis, upon which she paid taxes to Douglas county.

The record discloses that more than 50 years ago Edward P. Meyers, then 21 years of age, located in Arthur county on a homestead consisting of a section of land, upon which he had a home and necessary appurtenances. During his lifetime he attained considerable success as a cattle man, and through marked attention to his business became wealthy. He lived continuously and apparently without interruption in Arthur county for many years, but during the later years of his life, more especially during the period of his second marriage some 20 years ago, he occasionally took trips in foreign countries, in Florida, or other places. In 1919 he rented an apartment at the Blackstone Hotel in Omaha and spent some time in Omaha each year. About eight or nine years prior to his death he moved to the St.

Regis apartment which he leased from year to year. The younger daughter attended a private school in Omaha, Duchesne Convent, and was so attending at the time of her father's demise. During the school year Meyers spent most of his time in Omaha, except occasionally, in the spring and fall, he would go to Arthur county to attend to his business, especially during the shipping season, and, together with his family, he spent the summers at his ranch home.

The evidence reflects that the decedent voted continuously in the elections held in Arthur county over a period of 50 years or more, and, in fact, voted there in the election of 1938, about three weeks before his death, and on one occasion, when absent from Arthur county, voted on an absentee ballot, accompanied by an affidavit as provided for by law. He repeatedly declared Arthur county to be his home to his wife, family and friends during the whole period of time that he lived in Omaha. In his later years he suffered from chronic ailments, of the kidneys and a weakened heart. The record is not in dispute that it was necessary for him to obtain constant medical treatment, that he was under the care of Omaha physicians, and that he could not stand the rigorous winters in Arthur county. He did his banking business in Omaha. There were no banks in Arthur county. He filed personal tax returns and paid his personal taxes in Arthur county. Without question he was assessed for taxes in Arthur county from the organization of the county as such until at least the year 1938, as shown by the county assessor. A certified public accountant, employed by Meyers in 1919 to assist in looking after his business interests, prepared the personal tax schedules for him for a period of many years and included therein all of the taxable personal property that the decedent owned. The Arthur county home was always open during the life of Mr. Meyers, but was not equipped for the winter months. His wife testified that her husband spent practically 50 per cent. of his time in Arthur county and 50 per cent. in Douglas county, in addition to the time in the early spring and late fall which he spent in Arthur county until the late years of his life. He

owned no property of any kind in Omaha and paid no taxes in Douglas county.

"The term 'domicile' is difficult of accurate definition, and it has been stated that the concept cannot be successfully defined so as to embrace all its phases. Its meaning, in each instance, depends upon the connection in which it is used." 17 Am. Jur. 588, sec. 2.

As stated in *Thorndike v. City of Boston,* 42 Mass. 242: "No exact definition can be given of domicile; it depends upon no one fact or combination of circumstances, but from the whole taken together it must be determined in each particular case."

"It is universally held that in order to acquire a domicile by choice these essentials must concur: (1) Residence (bodily presence) in the new locality, and (2) an intention there to remain. In other words, there must be a concurrence of the fact and the intent, the factum and animus. Act and intent must, therefore, concur, and the absence of either of these thwarts the change. In addition there must be an intention to abandon the old domicile. As some writers express it, there must be an animus non revertendi and an animus manendi. The purpose to remain in or at the domicile of choice must be for an indefinite period of time." 17 Am. Jur. 599, sec. 16. See *Berry v. Wilcox,* 44 Neb. 82, 62 N. W. 249; *Wood v. Roeder,* 45 Neb. 311, 63 N. W. 853; *State v. School District,* 55 Neb. 317, 75 N. W. 855; *Shaw v. Alexander,* 94 Neb. 774, 144 N. W. 907; *Mudge v. Mudge,* 111 Neb. 403, 196 N. W. 706; *Denny v. Sumner County,* 134 Tenn. 468, 184 S. W. 14. In the last named case are cited *Hayes v. Hayes,* 74 Ill. 312; *Jopp v. Wood,* 34 L. J. Ch. n. s. 212; *Moorhouse v. Lord,* 10 H. L. Cas. *272. See, also, Jacobs, Law of Domicile, sec. 72; Wharton, Conflict of Laws, sec. 21; *Reed's Will,* 48 Or. 500, 87 Pac. 763.

We recognize that the intent of a person is not readily susceptible of analysis, and, therefore, in keeping with the great weight of authority, conclude that all of the surrounding circumstances and the conduct of the person must be taken into consideration to determine his domicile. It is

obvious from the record in the instant case that Mr. Meyers was not physically well. He was advised that he could not stand the severe winters in Arthur county and he was under the supervision and care of physicians in Omaha. The record is void that the same care and attention could have been given him in Arthur county. It is likewise clear that, when his younger daughter arrived at the age where it was necessary to educate her, the previous traveling and placing her in schools in different localities would result unfavorably to her from an educational standpoint. Therefore, living in Omaha, the metropolitan city of the state, not a great distance from his business activities, would be logical. In so doing, he did not burden the city of Omaha with educating his daughter, but placed her in a private school at his own expense. He returned to Arthur county in the late spring and fall to attend to his cattle business,—the business in which he had made a success in the county in which he had lived all his life. In the summer months and during school vacations the family returned to Arthur county to the ranch home and there lived until opening of the next school year. There is nothing in the record to show that after the completion of his daughter's education, or in the event that he recovered his health, he would have made Omaha his permanent residence. He transacted banking business in Omaha, but there were no banking facilities in Arthur county, and, by necessity, his financial contacts, in a business of the magnitude which he managed, must be such that he could obtain ready financial assistance when the occasion demanded. This is not unusual. Apparently, he lived quietly in his St. Regis apartment for the purposes as before stated. We believe that his every act discloses his intention not to create a domicile in Omaha.

Mr. Meyers voted in Arthur county, from the time he located there, in every election except when he was traveling in foreign countries, and, when absent, he voted an absentee ballot, supported by an affidavit, as provided by law, that he was a citizen and resident of Arthur county. He voted in person in Arthur county shortly before his death,

at the 1938 primary election.

In support of the theory that in Nebraska voting is conclusive as to the question of domicile, appellee cites *Mallard v. First Nat. Bank*, 40 Neb. 784, 59 N. W. 511. We are inclined to the belief that the statement in reference to voting being conclusive in establishing domicile, as made in the cited case, is *dictum*. The rule applicable in the instant case is reflected by the following:

"Of all the formal acts to be scrutinized in ascertaining a person's domicile, undoubtedly the act of registering and voting is the most important, and while not necessarily conclusive, it is usually most convincing and persuasive." *Matter of Curtiss*, 140 Misc. 185, 250 N. Y. Supp. 146. See annotation, 107 A. L. R. 453.

In the case of *Cooper's Adm'r v. Commonwealth*, 121 Va. 338, 93 S. E. 680, it was said (p. 349): "In doubtful cases particular significance should be attached to the repeated exercise of the right to vote, because this right depends upon citizenship and domicile, and must be generally, if not universally, supported by the oath of the voter. Its unlawful exercise subjects him to prosecution both for illegal voting and for perjury if he swears falsely, and such act is a distinct, unequivocal and public assertion by the voter of his legal domicile."

The court in *Sanderson v. Ralston*, 20 La. Ann. 312, upon rehearing, reexamined all the evidence and determined that the voting might be viewed in connection with certain antecedent facts as corroborative evidence to show that a person never intended to abandon his domicile in the state, although it asserted that the voting would not be conclusive by itself. See annotation, 107 A. L. R. 454.

In view of the foregoing authorities, we conclude that the fact that Mr. Meyers continuously voted in Arthur county is a strong factor in assisting to determine the status of his domicile.

It is disclosed that the change of residence to Omaha was for the purpose of benefiting the health of Mr. Meyers, and, in addition thereto, of educating his younger daughter. In

17 Am. Jur. 608, sec. 30, it is said: "A change of residence for the purpose of benefiting one's health does not usually effect a change of domicile. Such a change is looked upon as temporary merely, even though the actual time spent in the new residence may be long."

In *Reed's Will, supra,* the supreme court of Oregon said: "It is not residence alone, but it is the intention of the person, expressed or implied from the facts in evidence, conjoined with residence, that determines domicile. Every person *sui juris* and capable of controlling his personal movements may change his domicile at pleasure, but a change of domicile involves intention as the dominant factor. * * * A change of domicile, therefore, involves a question of fact and intent. The fact is easily proved because it is shown by the mere transfer of the bodily presence from the old to the new place of abode, but the intent with which the change is made is to be determined from the character of the residence, its object and purpose, in connection with the other evidence in the case. Residence in a particular place is a fact obvious to the senses and cannot be easily mistaken, but its value in fixing domicile is unimportant unless accompanied with an intent of remaining permanently or definitely, or, as it is sometimes said, with no present intent of removing therefrom. Residence alone, however long continued, will not effect a change of domicile. On this point the authorities speak with practically one voice. * * * To lose a domicile when once acquired, there must be an intention to do so. A mere change of the place of abode, however long continued, is not sufficient, unless the proper animus or intention is present." It was said that the intention must concur with fact and must clearly appear.

To us it is apparent that Mr. Meyers' residence in Omaha was temporary and for the purposes as above set out, and, from all of the facts and circumstances from which we can discern his intention, he did not intend by such residence to create a domicile in Omaha, or to abandon his domicile as originally created in Arthur county. See *State v. School District, supra*; *Denny v. Sumner County, supra.*

Generally, oral or written declarations of a deceased person as to his domicile do not bear much weight in a consideration of the question. However, when all of the facts and circumstances of a given case are considered, occasions arise where declarations, both oral and written, as to an intention on the part of the person, become important and receive considerable weight from the courts; based, of course, upon the individual under consideration, his conduct, his business, the period of his living in one locality, and all other facts that may be deduced from any circumstance.

In the case of *Reed's Will, supra,* we find the following (p. 516): "And Mr. Jacobs, in speaking of the weight to be given to the oral declarations of a party, says: 'The time, occasion and manner of making them, their reasonableness and consistency with themselves and with the other proved facts in the case, the presence or absence of the suspicion of sinister purpose in making them, the character and temper of the person, as well as (if they are oral) the length of time which has elapsed between the time of their alleged utterance and the time when they are testified to, etc., enter materially into the estimation of their value. If they are not inconsistent with the acts, and are faithfully reported, they often serve to turn the scale; but it is otherwise, if they are contradicted by the acts and general conduct of the person making them.'"

Nine years before his death, Mr. Meyers declared in his last will and testament that he was a resident of Arthur county, Nebraska. The making of a will naturally is a solemn occasion and especially so when a man is in poor physical condition and has reached old age. He contemplates the objects of his bounty with seriousness. Under the circumstances, the making of his will and the declarations, oral and written, as to his residence and domicile, made by him over a period of years are of such importance that such declarations and written instruments may be received, together with all the other evidence in the case, in assisting to determine the domicile of the decedent.

Having determined this case solely upon its merits, other alleged errors of the appellant need not be considered.

We conclude that the judgment and finding of the district court were right.

AFFIRMED.

LLOYD E. HAYNES V. STATE OF NEBRASKA.
288 N. W. 382

FILED NOVEMBER 10, 1939. No. 30588.

1. **Rape.** "In a prosecution for rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn." *Fager v. State*, 22 Neb. 332, 35 N. W. 195.
2. **Criminal Law: INSTRUCTIONS.** In a prosecution for rape where no request for such an instruction is made, it is not error for the trial court to fail to instruct on the lesser included offenses.
3. ———: ———. In a prosecution for rape, it is not prejudicial error for the trial court to set out verbatim in his instructions the charging part of the information, where the court follows that instruction with an instruction in its own language as to the material elements of the offense.

ERROR to the district court for Lincoln county: J. LEONARD TEWELL, JUDGE. *Affirmed as modified.*

Beatty, Maupin, Murphy & Davis, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Rush C. Clarke, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

SIMMONS, C. J.

The defendant, aged 31, was convicted of assault with intent to commit rape upon a female child 12 years of age. He was sentenced to the penitentiary for a period of 15 years. He brings proceedings in error here.

Defendant's first contention is that the evidence is insufficient to support the verdict of the jury. It will not be of advantage to the parties involved to set out a detailed abstract of the evidence. The crime is alleged to have been committed during the early morning of June 22, 1938, on a side road leading from one of the main traveled highways in Lincoln county, Nebraska. There is no dispute but that the defendant, the complaining witness, and her older sister were together for a period of time immediately preceding the commission of the alleged offense, and that he was alone with the complaining witness at the scene of and at the time of the alleged offense. The complaining witness testified in detail as to the assault. While the defendant denies the act, her testimony is fully corroborated as to material facts and circumstances. Her physical condition, as indicated by examinations of reputable physicians, also supports her testimony. The evidence is sufficient to support the verdict of the jury.

This court has held: "In a prosecution for rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn." *Fager v. State,* 22 Neb. 332, 35 N. W. 195. See *Kotouc v. State,* 104 Neb. 580, 178 N. W. 174; *Robbins v. State,* 106 Neb. 423, 184 N. W. 53; *Mayo v. State,* 127 Neb. 227, 254 N. W. 887; *Beer v. State,* 129 Neb. 366, 261 N. W. 824.

The defendant next contends that the trial court failed to instruct the jury on the lesser offenses of assault and assault and battery. It is admitted that a request for such an instruction was not made. It was not error on the part of the trial court to fail to charge as to the lesser offenses in the absence of such a request. *McConnell v. State,* 77 Neb. 773, 110 N. W. 666; *Williams v. State,* 113 Neb. 606, 204 N. W. 64; *McIntyre v. State,* 116 Neb. 600, 218 N. W. 401; *Beer v. State, supra.*

The information in this case contained five counts. At the close of the state's case, upon motion of the defendant, the first, second, and third counts were dismissed, and the court ruled that counts 4 and 5 would be tried as one count. In its instructions, the court set out verbatim the charging parts of counts 4 and 5, and instructed the jury that the counts differed only in that one alleged the crime charged to have been committed by different means than the other, and that some of the allegations contained in each of the counts had become immaterial.

The court further in its own language set out the material elements of the crime of rape, which were charged in the two counts, and instructed the jury that, if they found from the evidence beyond a reasonable doubt that each and every one of said elements were true, they should find the defendant guilty of the crime of rape; that, if they did not so find, they would next consider the question of whether or not the defendant was guilty of the crime of assault with intent to commit rape. The court then set out in its own language the material elements of assault with intent to commit rape, and instructed the jury that, if they were satisfied beyond a reasonable doubt that all the elements of the crime of assault with intent to commit rape were true, they would find the defendant guilty of that latter crime. If they were not satisfied beyond a reasonable doubt of the truth of any of said elements, then they would find the defendant not guilty.

The defendant contends that the action of the trial court in setting out both counts verbatim was prejudicial. This court has held:

"It is the better practice in a criminal case for the trial court to charge the jury, in concise and informal language, as to the material facts which must be proved beyond a reasonable doubt to authorize a conviction, rather than to copy the information or indictment into its instructions." *Kirchman v. State,* 122 Neb. 624, 241 N. W. 100.

However, the language of the information set out involved no technical or ambiguous language. We cannot see

that it was prejudicial to the defendant to have the language of the count set out, particularly in view of the fact that the court, subsequent thereto, in its own language, complied with the better practice rule established in the case of *Kirchman v. State, supra.* See *Dixon v. State,* 46 Neb. 298, 64 N. W. 961; *Cooper v. State,* 123 Neb. 605, 243 N. W. 837.

The defendant further contends that the sentence imposed in this case is excessive. After a consideration of the circumstances, as shown by the record, we conclude that there is merit in this contention. By authority of section 29-2308, Comp. St. 1929, the sentence is reduced from 15 to 7 years.

The judgment is

AFFIRMED AS MODIFIED.

CLAUDE O. DRAKE, APPELLEE, V. S. D. RALSTON, APPELLANT.
288 N. W. 377

FILED NOVEMBER 10, 1939. No. 30597.

Evidence in the record examined, and *held* sufficient to sustain the judgment entered.

APPEAL from the district court for Dawson county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Halligan, McIntosh & Halligan, for appellant.

Cook & Cook and *Hoagland, Carr & Hoagland, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

EBERLY, J.

This is an action prosecuted by S. D. Ralston to vacate a default decree entered in this cause (the injunction case) on January 17, 1936, in favor of Claude O. Drake and against S. D. Ralston, wherein the district court found "that said Claude O. Drake is the owner of a 2/11ths interest in the northwest quarter of section 29, in township

12, range 23, and the southwest quarter of section 29, township 12, range 23, Dawson county, Nebraska" (excepting a ten-acre tract thereof specifically described in such decree), and quieted his title thereto against the claims of S. D. Ralston therein evidenced by a judgment particularly described, and enjoined the enforcement thereof against the same.

The application to vacate the judgment herein is based on the fourth subdivision of section 20-2001, Comp. St. 1929, viz., "For fraud practiced by the successful party in obtaining the judgment." There was a trial to the court, and, at the completion of the hearing upon the evidence adduced, the court denied the petition and dismissed the action. The petitioner, S. D. Ralston, who will be hereinafter referred to as appellant, prosecutes this appeal.

The chronology of the events and transactions from which this litigation arises, in part includes the following, viz.:

December 21, 1910, Josephine Pollat, then the owner of the southwest quarter of section 29, township 12, range 23, in Dawson county, Nebraska, reserving to herself a life estate, conveyed the same by deed of general warranty, duly executed and delivered, to her children, who are named therein as grantees, each son and daughter to receive, under the terms of said deed, an undivided 1/11th interest in the lands just described. Included in this deed as grantees were Lewis Pollat and Anna Pollat (now Mrs. Anna S. Drake, wife of Claude O. Drake).

May 25, 1930, Josephine Pollat departed this life testate, then the owner in fee of the northwest quarter of section 29, township 12, range 23, in Dawson county, Nebraska, excepting ten acres in the northwest quarter of the northwest quarter of the northwest quarter. The last will and testament of Josephine Pollat was admitted to probate, and by its terms devised to Lewis Pollat, a son, and to Anna Pollat, a daughter, each an undivided 1/11th interest in the lands in this paragraph described.

May, 1930, the original note of $2,500 was made and delivered by Anna S. Drake and Lewis Pollat to the Stock-

mens State Bank in consideration of a loan of money then made.

March 28, 1932, Lewis Pollat and wife, Ruth, in alleged consideration of $1,000 paid by Claude O. Drake, executed and delivered their warranty deed conveying their 1/11th interest in all the lands hereinbefore described to Anna S. Drake, wife of Claude O. Drake.

December 7, 1932, Anna S. Drake, in consideration of the sum of $1,000 paid by Claude O. Drake, it is alleged, conveyed to him an undivided 2/11ths interest in all the lands heretofore described, as derived from Josephine Pollat.

February 15, 1933, suit was instituted against Lewis Pollat and Anna S. Pollat in the district court for Lincoln county, on a promissory note of $1,900, executed by them in renewal of the balance due on the original $2,500 note executed by them. Personal service of summons was had on all defendants.

December 18, 1934, judgment was entered on this $1,900 note, after trial on the merits, in favor of S. D. Ralston for the sum of $2,189.50 with interest from this date at 8 per cent. It will be noted that this judgment was affirmed in the supreme court. *Stockmens State Bank* (Ralston substituted) *v. Pollat*, January 24, 1936, 130 Neb. 244, 264 N. W. 875.

December 19, 1934, after issuance of execution and return of same *nulla bona* in Lincoln county, a duly certified transcript of this judgment was filed in Dawson county, execution issued thereon, and levied upon the 2/11ths interest in the real estate heretofore described as conveyed to Claude O. Drake by his wife, Anna S. Drake, as the property of the wife, and execution sale of said premises was advertised for February 15, 1935.

February 15, 1935, Claude O. Drake instituted an action for an injunction and to quiet title to the premises levied upon. A temporary injunction was allowed, and together with summons issued on the same day was on February 15, 1935, served upon S. D. Ralston, and upon Henry E.

Ash, sheriff of Dawson county. This summons was unindorsed and no pleadings were filed by Ralston or the said sheriff in this proceeding until the institution of the present application to set aside the judgment entered, and no appearance made whatever. This proceeding will be hereafter referred to as the "injunction case."

April 18, 1934, Claude O. Drake and Anna S. Drake *et al.*, plaintiffs, commenced an action for partition in the district court for Dawson county, the object and prayer of which was to secure a partition of all the lands formerly owned by Josephine Pollat, deceased, as hereinbefore described. Service of process on all parties in interest was had and issues joined. This case will hereinafter be referred to as the "partition proceeding."

December 6, 1934, judgment confirming shares and directing partition was entered, adjudging Claude O. Drake the owner of an undivided 2/11ths interest therein.

December 20, 1934, S. D. Ralston caused to be filed in the partition proceeding a petition in intervention, which was in form a creditors' bill; this in appropriate language alleged the rendition of petitioner's judgment against Anna S. Drake and Lewis Pollat, the issuance of execution thereon in the county of rendition and the officer's return thereto of *nulla bona*, the filing of a certified transcript thereof in Dawson county, the issuance of execution thereon and the levy of such execution on the undivided 2/11ths interest in the land hereinbefore described (being the same land conveyed by Anna S. Drake to her husband, Claude O. Drake); alleged that the conveyance last referred to was not *bona fide*, but made without valuable consideration, with fraudulent intent by the parties thereto of cheating, hindering, delaying and defrauding the petitioner, S. D. Ralston, in the collection of his said judgment. This petition in intervention contained an appropriate prayer for the application of said 2/11ths interest in the lands heretofore described to the satisfaction of S. D. Ralston's judgment, and costs accruing thereon. Process on this pleading was duly issued and served upon the parties in interest.

January 21, 1935, a demurrer was filed to this petition in intervention by Claude O. Drake and Anna S. Drake, which, upon hearing, was on February 7, 1935, overruled, and the order required demurrants to answer intervener's petition within 30 days from this date.

March 18, 1935, answers of plaintiffs Claude O. Drake and Anna S. Drake to the petition in intervention were filed, and issues joined. In these pleadings substantially the same facts were alleged as were set forth by these parties in the injunction case.

October 23, 1935, a sale of the premises by the referee was had and report thereof filed on October 24, 1935.

January 17, 1936, the report of sale was confirmed, deed ordered, and proceeds of sale distributed. This decree provides specially, viz.:

"It is further ordered and decreed that the share of the plaintiff, Claude O. Drake, in and to the proceeds of the sale of said land as shown in the judgment of partition entered in this cause, be and the same hereby is impounded with the clerk of this court until the further order of this court and until the determination of the claim of the intervener, S. D. Ralston, and the referee herein is hereby ordered and directed to pay said sum to the clerk of this court.

"The plaintiff, Claude O. Drake, excepts the impounding of the money with reference to his share in regard to the claim of the intervener, S. D. Ralston, in open court."

This decree, though made January 17, 1936, was filed and recorded January 21, 1936.

January 17, 1936, after the decree of confirmation had been announced from the bench and entered in the partition proceeding, attorney E. E. Carr, in the absence of S. D. Ralston and his counsel, called up and caused to be entered a default decree quieting title in the injunction case of Claude O. Drake v. S. D. Ralston.

February 16, 1936, the October, 1935, term of the district court for Dawson county adjourned *sine die*.

December 15, 1936, the amended answer of Claude O.

Drake and Anna S. Drake was filed in the partition proceeding, pleading the judgment entered in the injunction case by default on January 17, 1936, as *res adjudicata* and as in bar of S. D. Ralston's demands.

The actual contention of appellant in this case is, viz.: That prior to January 17, 1936, it had been agreed between R. H. Beatty, as attorney for S. D. Ralston, and E. E. Carr, as attorney for Claude O. Drake and Anna S. Drake, Lewis Pollat and Ruth Pollat, that partition proceedings should proceed, and that said property should be advertised and sold in said partition proceeding, and the rights of said intervener and Claude O. Drake, Anna S. Drake, Lewis Pollat and Ruth Pollat could be determined, and that a sale in said partition proceedings would be for the best interests of all parties concerned; that the rights of said parties in and to said real estate or the moneys to be derived from the said sale of said real estate would be tried upon the issues joined in the partition proceeding, and no further action would be taken in said injunction case; that this agreement was relied upon by appellant and no pleadings filed in, or attention paid to, the injunction case by him or his attorneys; that the defendants Claude O. Drake and Anna S. Drake, in violation of such agreement, secured the entry of a decree quieting their title to the 2/11ths interest in said land and now plead the same in bar to the claims of appellant, Ralston, in the partition proceeding.

Excepting the fact of pleading in bar, the foregoing is substantially denied by the Drakes.

In support of appellant's contention, attorney Beatty testified, in reply to an interrogatory by Victor Halligan, viz.:

"Q. And will you state what talk you had there with Mr. Carr at that time? A. Mr. Carr came into our office. You and I were sitting in the office, and Mr. Carr had just brought this injunction suit and prevented the sale on an execution that I had issued on the Lincoln county judgment. And I said to him, 'I see that you brought an

injunction suit to enjoin the holding of our sale in Dawson county,' and he said, 'Yes, I did,' and he said, 'I don't see any use in having two or three lawsuits pending over the same thing.' And I told him then, I said that that was your opinion, that you had also said there was no reason why the whole thing couldn't be determined in the partition suit, and that I saw no reason why the whole matter couldn't be determined in the partition suit, and he said that was his idea, too. Q. Now, after that talk you had there, did you take any steps in the injunction suit at all? A. No; I took no steps in the injunction suit."

He also testified, as to another conversation had by telephone between himself and attorneys Stewart and Carr, viz.:

"The Court: Just tell who you talked with. A. Yes, sir; that's what I'm doing. Mr. Stewart called me on the telephone, long-distance, and told me that Judge Nisley was in Lexington, and that they were having a session of court, and he said that he wanted to take a confirmation in the partition case of Drake against Morrow, I think is the name the case goes under, and wanted to know if I wanted to come down; and I told him I didn't want to come unless it was necessary; and he said they wanted to take a decree of confirmation, and I told him that that would be all right with me, to go ahead and take the decree of confirmation, provided that in the decree of confirmation it was provided that the 2/11ths interest, the money from the 2/11ths interest, should be impounded in the hands of the clerk of the district court until it was determined as to who had title to it in the partition suit; and Mr. Stewart said to me, 'Mr. Carr is right here. I'll let you talk to him.' And I then talked to Mr. Carr, and I told Carr that it would be perfectly agreeable with me to go ahead and take the decree of confirmation in the partition case provided the court entered an order that the money be impounded for the 2/11ths interest in the hands of the clerk of the district court, pending the rights between Ralston and his clients being determined in the partition

case. Mr. Carr said that was all right with him, that he didn't want it to appear on the face of the record, but as far as his clients were concerned that he was consenting to the order impounding the money, and that he had no objection to it being put in there if I would permit him to put an exception in the journal; and I told him that that would be perfectly agreeable with me, that he could put an exception in the journal; and he said all right, they would go ahead, then, and take the decree. Q. Now, that was virtually the content of the conversation, as you recall it? A. That is the substance of the conversation. * * * Q. After that, was there forwarded to you the journal entry for you to approve? A. There was; Mr. Stewart sent the journal entry to me for my approval, in accordance with our conversation."

In this connection, we note that defendants Drake presented a motion to strike all of this testimony because not reduced to writing, and "is in violation of standing orders of this court." This motion was overruled.

On the subject of the first conversation referred to above, attorney E. E. Carr testified as follows:

"Q. Well, I asked you if you had been in Halligan, Beatty & Halligan's office at a time about thirty days after the injunction suit was started? A. Well, I think that would be about—Oh! after the injunction suit was started? Q. After the injunction suit was started? A. No. I would say it was before that, Mr. Cook. Q. I will ask you whether or not at a time about thirty days after the 15th day of February, 1935, or at any other time, you were in the office of Halligan, Beatty & Halligan, at a time when Mr. Beatty and Mr. Halligan were present, and if at that time or at any time you stated, in reply to a question by Mr. Beatty as to the Ralston sale, that you had enjoined the sale, or in which Mr. Beatty stated to you that he had been informed that you had enjoined the sale, and if you then stated to Mr. Beatty that you didn't see any use in having two lawsuits involving the same matter, and that you thought the matter could all be deter-

mined in the partition case, and if Mr. Beatty said to you that that was Mr. Halligan's idea, and it was all right with him? A. No, sir. I did not. Q. Did any such conversation occur between you and Mr. Beatty and Mr. Halligan, or either of them, at any place, at any time? A. No, sir. I will say this: There was a conversation in Mr. Beatty's office, in their library, one time, relative to the hearing on the partition suit, about that matter coming up. The injunction suit was never mentioned in their presence, that I know of. I didn't even know they were attorneys for Ralston in the injunction suit."

With reference to the matters discussed immediately prior to the confirmation, the following testimony was given by attorney Carr:

"Q. Now, just state as well as you can the conversation you had with Mr. Stewart with reference to this partition case. A. Well, as I recall it, when I came here Mr. Stewart and Mr. Johnson called me out in the clerk's office and said, 'Now, we would like to have this sale confirmed.' * * * And Mr. Stewart said, 'You have got a good price there. Ten thousand dollars is all that land will bring, and the bidder is going to back out unless that sale is confirmed.' And I told him that we could not consent to any confirmation because there were other issues involved in that case, and if a confirmation came up without a determination of our interests it might jeopardize our rights to that money, and we wouldn't consent to it; and he said, 'Well, why can't we put that in court, tie it up in court?' And I recall definitely of telling Mr. Stewart that I was afraid of any order taking this property and converting it into personalty and tying it up in court under those conditions, and that I wasn't particularly objecting to the confirmation only as it affected the distribution of those proceeds, but that I thought we were entitled to that money. And they insisted on the confirmation coming up; and then he called up Mr. Beatty or Mr. Beatty called him. I don't know just how it was. I recall the conversation between Mr. Stewart and Mr. Beatty in which he asked Mr. Beatty

if he had any objection to the money being put up with the clerk of the district court. Q. I will ask you whether or not you talked to Mr. Beatty at all over the telephone that day? A. No; I did not."

It may be said that throughout the record there appears a definite and substantial contradiction in the testimony of attorney Carr and attorney Beatty on the subject of "trying out" the contest on the issues framed in the partition case and letting the injunction case "stand open." Attorney Beatty testified that his partner, Victor Halligan, was present and participated in the first conversation with attorney E. E. Carr held in their office, but Mr. Halligan, though present in court and participating in the trial as an attorney, failed to testify. Attorneys Stewart and Johnson were present when the telephonic conversation was had between attorney Beatty at North Platte and attorney Stewart at Lexington, relative to the confirmation of the partition sale. As part of this conversation attorney Beatty testified that he talked with attorney Carr with reference to the final determination of the disputed questions in the partition proceeding. Mr. Carr's statement is that at this time he had no conversation whatever over the telephone with attorney Beatty, and in this he is not contradicted by the other witnesses who were present at the time with him at Lexington.

The form of the issues here presented imposed on appellant the burden of establishing the allegations of his application to vacate the decree of January 17, 1936, by a preponderance of the evidence. The trial judge, who personally heard the proof adduced and observed the demeanor of the witnesses as they testified determined this issue adversely to appellant's contention. The question of fact which evidently was decisive in the district court was whether the oral agreement with reference to the trials of the injunction case and the partition proceeding had been actually made and entered into by these attorneys.

True, the powers possessed by attorneys by virtue of their office are limited. Our statute provides: "An attorney

or counselor has power: * * * Second. To bind his client by his agreement in respect to any proceeding within the scope of his proper duties and powers; but no evidence of any such agreement is receivable, except the statement of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court." Comp. St. 1929, sec. 7-107.

The rule early announced in this state was: "Written agreements of attorneys, or those entered into by them in open court, in regard to the disposition of cases, will be enforced; but oral agreements, entered into out of court, will not be recognized or considered." *Rich v. State Nat. Bank*, 7 Neb. 201. See, also, *German-American Ins. Co. v. Buckstaff*, 38 Neb. 135, 56 N. W. 692; *Anderson v. Walsh*, 109 Neb. 759, 762, 192 N. W. 328.

In connection with the *Walsh* case cited above, it will be noted that in the instant case we are confronted with a motion to strike the oral evidence relating to the claimed agreement as incompetent. However, this may not be the decisive question in the instant case. As it comes to this court, the appellant carries the burden of proof. An attorney on each side constitute the sole witnesses, whose testimony must determine the existence of the disputed oral agreement. Neither witness is impeached. Under these circumstances, the fact becomes important that the trial judge, who personally heard the testimony adduced and observed the demeanor of the witnesses when testifying, accepted the testimony tendered by the appellee rather than the evidence produced by the appellant. Therefore, on trial *de novo*, this court, in view of the entire record, finds for the appellee and against the appellant.

The judgment of the district court is, therefore,

AFFIRMED.

CARTER, J., dissenting.

It is the contention of the appellant in this case that his attorney entered into an oral stipulation with the attorney for appellees to the effect that a partition suit then pending should proceed to trial and that the rights

of the parties to the moneys derived from the sale of the lands involved should be tried out in the partition proceeding instead of in an injunction suit that had been commenced by Claude O. Drake, one of the appellees. During the pendency of the partition action, without the knowledge or consent of appellant's attorney, appellee's attorney secured a default decree in the injunction suit in which title to appellee's claimed interest was quieted in him. This decree was then successfully pleaded as *res adjudicata* of the matters involved in the partition suit and deprived appellant of a trial of his claims on the merits.

That conversations were had between the attorneys for the respective parties relating to the disposition of the cases is amply borne out by the evidence. It is true that the evidence is in conflict as to whether the agreement was actually made by the two attorneys. It is evident, however, that both attorneys knew that the case was to be contested, and that neither party intended to default. Under such a state of facts the trial court should have vacated the default decree procured by appellee's attorney and permitted appellant to appear and defend.

This court has often said that attorneys are officers of the court, over whom the court may exercise a limited amount of supervision. Litigants generally place some confidence in these judicial assertions. One attorney ought not to be permitted to take a default decree favorable to his client, when he must have known from the circumstances surrounding the litigation of the intention of the other party to contest it, especially where it appears that the other attorney has been lulled into a feeling of security by reason of conversation had between them.

The purpose of courts is to arrive at justice between litigants who are unable to solve their own difficulties. To do so in an efficient way, rules must be adopted and followed. But a litigant, free from fault and without knowledge of the real facts, ought not to be deprived of his defense because officers of the court disagree as to the re-

sult of conversations had between them when both knew that each had interests which he desired to maintain. The enforcement of rules ought not to become such a fetish that the objectives of the law are lost and innocent litigants thereby compelled to risk their cases in a game of wits instead of in an impartial trial on the merits.

In my judgment, the trial court should have vacated the default judgment, and it was an abuse of discretion constituting reversible error on his part not to do so.

I am authorized to say that Simmons, C. J., and Johnsen, J., concur in this dissent.

HENRY HOMPES, APPELLEE, V. B. F. GOODRICH COMPANY ET AL., APPELLANTS.
288 N. W. 367

FILED NOVEMBER 10, 1939. No. 30533.

1. **Monopolies.** A combination or conspiracy between two or more persons against any person, firm or corporation to damage or destroy the business of such person, firm or corporation, which is carried into effect, is a violation of the Junkin Act (Comp. St. 1929, art. 8, ch. 59), and subjects such wrong-doers to an action for damages.
2. ———: PROOF. A conspiracy need not be established by direct evidence of the acts charged, but may, and generally must, be proved by a number of indefinite acts, conditions and circumstances, which vary according to the purposes to be accomplished. The evidence as a whole must show by a preponderance, however, the intent of the alleged wrong-doers to accomplish a result prohibited by the statute.
3. ———: ———. When the alleged overt acts are in themselves lawful, and the evidence does not tend to show an unlawful intent to conspire against and injure the business of another by stifling competition, the action must fail for want of proof.
4. ———. A person may do business with whomsoever he desires. He may likewise refuse business relations with any person whomsoever, whether the refusal is based on reason, whim or prejudice.
5. ———. One engaged in business has the right to meet competitive prices of merchandise of similar class, character or quality, and when he does so for the sole purpose of meeting

competition, there is no violation of the Junkin Act.

6. ———. A volume bonus, which provides for a discount to a dealer in accordance with the amount of purchases he makes, is in itself entirely lawful unless an intent be shown to grant it as a means of injuring or destroying the business of another.
7. **Contracts.** A written contract, if couched in clear, unambiguous language, is not subject to construction. The intent of the parties to such a contract must be deduced from the language used.
8. **Monopolies.** Evidence examined and *held* insufficient to sustain a judgment for damages under the Junkin Act.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Reversed.*

Flansburg & Flansburg and *F. C. Leslie,* for appellants.

Beghtol, Foe & Rankin, Walter E. Nolte and *Lawrence Vold, contra.*

Heard before ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ., and LANDIS, District Judge.

CARTER, J.

This is an action brought by the plaintiff, Henry Hompes, against the B. F. Goodrich Company and others under the Junkin Act (Comp. St. 1929, secs. 59-801 to 59-822) for damages alleged to have resulted from a conspiracy of the defendants, in restraint of trade, to exclude the plaintiff from dealing in Goodrich products and to monopolize a part of the trade and commerce of the state. From a verdict and judgment for $25,000, the defendants appeal.

The record shows that since 1925, under the trade-name of Hompes Tire Company, plaintiff has been conducting a business in the city of Lincoln of warehousing and selling Goodrich automobile tires, tubes and accessories manufactured by the B. F. Goodrich Company; that, as a part of the business, plaintiff erected a building at a cost of $133,000 in which to carry on his business, expended large amounts for equipment, and set up an organization of salesmen and dealers for selling Goodrich products, which resulted in the establishment of a profitable business.

Plaintiff claims that, prior to 1933, the defendant B. F.

Goodrich Company entered into a conspiracy with other defendants to induce plaintiff to invest large sums of money in the establishment of his business, and then to compel him to give it up so that the benefits thereof would accrue to the B. F. Goodrich Company. The specific acts alleged to have been committed, and which plaintiff claims are sufficient to establish a conspiracy, may be summarized as follows: (1) That the Goodrich Company sold its tires to competitors and customers of plaintiff in Lincoln at a lower price than they were sold elsewhere. (2) That the Goodrich Company limited the price at which plaintiff could sell its products, but placed no limit on competitors. (3) That the Goodrich Company sent salesmen into Lincoln to destroy sales under negotiation by plaintiff. (4) That, in violation of their contract, they shipped products within plaintiff's territory without passing the same through plaintiff's warehouse, so as to deprive him of his commission thereon. (5) That defendants refused to complete sales of tires made by plaintiff in the city of Lincoln. (6) That defendant Goodrich Company organized the State Tire Company of Lincoln to compete with plaintiff in the sale of tires, which corporation was owned by the defendant conspirators. (7) That the Goodrich Company organized similar stores in Beatrice and Fairbury to aid in the accomplishment of their unlawful purpose. (8) That the Goodrich Company threatened to and did refuse to deal with plaintiff on and after February 10, 1936, for the purpose of carrying out the conspiracy of the defendants to drive the plaintiff out of business for their benefit.

The relationship between the Goodrich Company and plaintiff was, at all times herein mentioned, evidenced by certain written contracts and agreements which were renewed from year to year, until the cancelation of the 1936 contract took place. It is necessary that the nature of these contracts be investigated before a proper understanding of the evidence can be had.

Plaintiff had a five-year contract dated November 14, 1935, with the Goodrich Company in which he agreed to

purchase his requirements of Goodrich products. This agreement provided that plaintiff should pay regular dealer prices less a 2 *per centum* cash discount if paid before the tenth of the following month. The balance of the contract pertained to advertising, sales efforts, deliveries, adjustments and other matters incidental to the business. It was specifically provided that the matter of bonus credits for volume purchases was not a part of the contract, the contract stating that the bonus credit for volume was in the nature of a reward subject to cancelation or revision at any time. A rider accompanied the contract, however, in which the schedule of credits for volume was set forth. These riders were apparently sent out on November 1 of each year with instructions to attach to the dealer's contract.

Plaintiff and the Goodrich Company also entered into a "Dealer Warehouse Agreement" in 1930 and each succeeding year thereafter, the general provisions of which were substantially the same. The provisions with reference to the allowance of warehouse commissions are as follows: "For our faithful performance of the terms and provisions of this agreement, you agree to pay to us on all merchandise delivered under this agreement from your warehouse stock to your customers on the list which you furnish us, a commission amounting to five (5) per cent. of the actual invoice value of such merchandise, less all discounts shown on the invoices, including two (2) per cent. allowed for cash, said commission to be paid monthly in the form of a merchandise credit. No commission will be paid on merchandise drawn from your stock stored with us and delivered to ourselves or shipped by us to your other branches or to dealers not on your customers' list on file with us, except when such deliveries to customers not on your list are made by us at your request. No commission will be paid on any deliveries made from our stock to your customers or branches. In the event of goods being returned by your customers, the commission on the original sale will be deducted from the commission to be paid to us."

It will be noted that the "Dealer Warehouse Agreement" does not purport to give plaintiff a commission on all products sold within a designated territory. It in fact provides for a commission of 5 per cent. on all merchandise delivered from plaintiff's warehouse to Goodrich customers on a list to be provided by the company, said list being described in another section of the contract as one containing customers whose credit ratings met the requirements of the company. Commissions were to be paid on shipments to others only after approval by the branch office of the Goodrich Company. All commissions, however, are limited to deliveries made from the plaintiff's warehouse. It is the contention of plaintiff, however, that the construction placed upon the contract by the parties themselves requires a different conclusion. The provisions of the contract appear to be so definite and unambiguous that we doubt if they are subject to construction. *Farmers Ed. and Coop. Union v. Farmers Ed. and Coop. State Union,* 133 Neb. 397, 275 N. W. 464; *Crancer v. Reichenbach,* 130 Neb. 645, 266 N. W. 57; *James Poultry Co. v. City of Nebraska City,* 135 Neb. 787, 284 N. W. 273. But even if so, the evidence does not show that plaintiff was paid commissions on products which were not delivered from his warehouse. The evidence does show that on June 6, 1934, credit was allowed the plaintiff for commissions in the amount of $28.55 on products delivered from the Omaha branch. Officers of the company were unable to account for this credit, and assumed that it was due to mistake. In view of the fact that the officers of the company at all times refused to grant such credits to the plaintiff, and in view of the fact that their position was in accord with the terms of the contracts entered into each year, we hold that one credit of $28.55, among a huge number of business transactions, is insufficient to sustain a finding of liability based on mutual subsequent interpretation of the contract. The record further shows that one Lawrence Goodale, a salesman of the Fisk Tire Company who sells the products of that company to plaintiff, and who was for many years a busi-

ness associate of the plaintiff, testified that during a part of the times mentioned he was a representative of the Goodrich Tire Company, engaged in the selling of Goodrich products in the territory served by the Hompes Tire Company warehouse. The substance of his testimony was that Goodrich products were sold in the territory serviced by the Hompes Tire Company, which were not delivered from plaintiff's warehouse, and that Hompes was paid a warehouse commission on such sales. Other than the one credit hereinbefore noted, the books, credit slips and other records of the Goodrich Company and Hompes Tire Company do not in any way corroborate this statement. No foundation was laid for the admission of this evidence. In so far as the record shows, the witness merely expressed an opinion without a factual foundation sufficient to warrant its admission. The testimony of the officers of the Goodrich Company denies that commissions were paid to plaintiff on products not delivered from his warehouse. We must necessarily conclude that plaintiff failed to sustain the burden of proof on this point. The trial court submitted these claims for commissions to the jury as an element of damage. We think the trial court should have withdrawn these items from the consideration of the jury and that the failure to so do constitutes prejudicial error.

It is the contention of plaintiff that the Goodrich Company organized, owned and controlled the State Tire Company of Lincoln and the State Tire Company of Beatrice, which with W. G. Sabine, the Goodrich Company's branch manager at Omaha, conspired with the Goodrich Company to destroy the business of the plaintiff by diverting it to these company-controlled stores. Evidence was offered in an attempt to show that the company-controlled stores received Goodrich products at a lower price than plaintiff, thus enabling the company-controlled stores to undersell plaintiff.

It is established by the record that Goodrich products were sold to the company-controlled stores at the same price they were sold to plaintiff. Each was allowed the same

cash and factory shipment discounts. Plaintiff was allowed his 5 per cent. discount on products delivered from his warehouse. The contention that favoritism was shown arises from the allowance of a volume discount. In this respect, both the company-controlled stores and plaintiff had the same volume discount schedule. Plaintiff's volume discount was fixed by adding together the output of all of his outlets. In determining the volume discount of the company-controlled stores, the output of all of them was added together, which naturally resulted in their receiving the maximum volume discount. The plaintiff was unable to reach the maximum, and as a result obtained a lesser volume discount. The allowance of a volume discount is not of itself a violation of the Junkin Act. If the purpose of the discount was to make it possible to unlawfully undersell the plaintiff and assist in carrying out the unlawful conspiracy or combine, a liability would, however, be established. It is necessary that the evidence concerning the granting of more favorable discounts to the company-controlled stores be examined with a view of determining whether they were granted for a purpose prohibited by the Junkin Act. In so considering it, we are not unmindful of the rule announced in *Marsh-Burke Co. v. Yost,* 98 Neb. 523, 153 N. W. 573, wherein we said: "A conspiracy need not be established by direct evidence of the acts charged, but may, and generally must be, proved by a number of indefinite acts, conditions and circumstances, which vary according to the purpose to be accomplished. If it be proved that defendants, by their acts, pursued the same object, although by different means, one performing one part and another another part, with a view to the attainment of the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object."

The evidence shows that the volume discounts allowed the company-controlled stores were in accordance with a long-established business practice of the Goodrich Company, and they knowing full well that the added volume of

all the company-controlled stores would exceed the amount required for the maximum volume discount, it was customary to grant such discounts as payments on their accounts were made. The question immediately arises whether the discounts were in fact allowed to permit the company-controlled stores to undersell plaintiff and still make a profit. The evidence is clear that plaintiff and the company-controlled stores were furnished identical retail price lists, which all were obligated to follow. Evidence was produced which showed that the State Tire Company of Lincoln had sold Goodrich products at a price lower than the one prescribed. It was subsequently established that these sales were in accordance with the National Recovery Act code price which had abrogated the company retail price list. Evidence was also produced that plaintiff, during the same period, was selling at the identical price established as the code price. It is equally clear to us that the amount of discounts allowed the company-owned stores becomes unimportant if such stores were actually owned by the Goodrich Company. It has never been held in this state that it was unlawful to favor one's self. This is particularly true where the retail price has been maintained and no underselling indulged in by the subsidiary agency. Since retail prices were uniformly maintained by the company-controlled stores, it cannot be said that the allowance of a larger discount for a larger volume of sales is a violation of the provisions of the Junkin Act.

Complaint is made that the establishment of the company-controlled stores was in violation of plaintiff's contract with the Goodrich Company and also a violation of the provisions of the Junkin Act. The evidence shows that plaintiff did not have an exclusive contract to warehouse, or sell at wholesale or retail, the products of the Goodrich Company. The 1936 warehouse contract provided that either party could terminate the contract on five days' notice. The dealer's contract provided for a cancelation on five days' notice if plaintiff's account became delinquent. The evidence shows that plaintiff was requested to provide further

outlets for Goodrich products in Lincoln, and he refused. The evidence further shows that he acquiesced in the establishment of the State Tire Company in Lincoln, that he aided in locating it and celebrated its opening by giving a party at his home. The evidence also shows that he advertised jointly with the State Tire Company for a period of time. It is true that plaintiff says an oral agreement was entered into that the merchandise for the State Tire Company was to be delivered from his warehouse, but we are obliged to say, without discussing all the evidence on the subject, that plaintiff failed to sustain this contention by the burden of proof. In fact, the written contracts between plaintiff and the Goodrich Company, entered into subsequent to the opening of the State Tire Company store, negative this contention. It is not even contended that the State Tire Company was placed on the list of dealers to be serviced from plaintiff's warehouse. A consideration of the evidence, both written and oral, convinces us that the Goodrich Company not only could lawfully establish an additional retail store in Lincoln, but that the plaintiff acquiesced in its so doing. The evidence shows that volume discounts allowed were in accordance with uniform schedules provided to all dealers and were not directed specifically at the plaintiff. We conclude from the evidence that the defendants did not conspire to injure plaintiff in a program of underselling. It is true that the retail price established by the Goodrich Company was departed from due to the functioning of the National Recovery Act and the meeting of competitive prices in the Lincoln community, but this cannot be said to be unlawful. It is established by the evidence that, while a uniform retail price list was furnished all Goodrich dealers, special discounts were allowable to certain classes of consumers by all dealers. As an example, any dealer could allow an additional discount to a county or the state, or to a national account customer. Reduced prices were at all times permitted to meet competition in the open market. Such discounts being permitted to all Goodrich dealers uniformly to meet like prices of competi-

tors of similar products cannot be said to be in violation of the Junkin Act.

In the final analysis of the situation, it is not material what business methods and practices are employed by a company and its subsidiary branches as between themselves. The real question is, what the branch does to its competitors and the public, and the fixing of the company's responsibility for wrongs committed by a subsidiary or branch owned and controlled by it.

There is evidence in the record that plaintiff became dissatisfied with his contracts with the Goodrich Company, and negotiated with a major competitor of the Goodrich Company for more favorable ones. Upon their procurement he demanded like terms from the Goodrich Company, and stated that unless they were granted he desired to abrogate existing contracts with the Goodrich Company. Plaintiff refused to pay his account until his demands were met, and as a result his account became past due and his dealer's contract subject to cancelation on five days' notice. The Goodrich Company refused his demands, and, in accordance with plaintiff's expressed desire, served the required notice preliminary to the cancelation of the contracts. We fail to see where the cancelation of the contracts in accordance with their very terms can operate to create a liability against the defendants, either by contract or under the Junkin Act.

The contentions of the plaintiff that the Goodrich Company sent salesmen into Lincoln to destroy sales under negotiation by the plaintiff is not sustained by the evidence. Nor is there evidence to sustain a finding that the Goodrich Company wilfully refused to complete sales of tires made by the plaintiff in the city of Lincoln. It must be borne in mind that plaintiff did not have an exclusive contract to sell tires at retail or wholesale in the city of Lincoln. So long as the Goodrich Company, or its subsidiary, the State Tire Company, competed for business by the usual methods without any attempt to injure the plaintiff by stifling competition, it cannot be said that the Junkin Act

has been violated. An examination of the record does not disclose that the defendants pursued any different business policy with plaintiff than they did with any other dealer or warehouseman engaged in the tire business. While each of the acts of defendants were in themselves lawful, such lawful acts accompanied by an ulterior motive might be actionable. We must, therefore, look into the evidence bearing upon the question of intent.

Plaintiff contends that a statement contained in a letter from the defendant W. G. Sabine to F. C. Leslie, manager of the legal department of the Goodrich Company, shows the ulterior motives of the defendants. The statement is: "Nevertheless, Firestone, Goodyear and U. S., I am well satisfied, have no interest in the Hompes Tire Company account at this time, having accounts of much better volume in this market. Therefore, no major warehouse deal is open to him." The record shows that the tire companies referred to were three of the chief competitors of the Goodrich Company at the time. The Goodrich Company felt that it had not been getting its share of the tire business for some time. Naturally, the fact that none of three chief competitors were in a position to deal with the plaintiff and thereby gain an opportunity to secure the former dealers of Goodrich products as their own, was information of interest and value to the officers of the B. F. Goodrich Company. We fail to see how this statement could be construed as showing an intent to destroy or damage the business of the plaintiff.

Plaintiff also contends that on or about March 13, 1936, at the time the Goodrich Company was removing its products from the Hompes warehouse, a remark was made by Ed Lawrie, president of the State Tire Company, W. G. Sabine, or R. T. Eastman, representatives of the Goodrich Company, to the effect that Hompes would wish he had not acted as he had because when they got through he would have nothing left. The only person testifying to this statement is Alfred Goodwin, who was at the time employed by the State Tire Company of Lincoln. This statement appears

to us to be merely an expression of belief that Hompes had made a mistake in not remaining as a Goodrich dealer and warehouseman, and that he would go broke as a result of his action. We fail to find the expression of any ulterior motive in this statement that could be said to show an intent to destroy the business of the plaintiff within the purview of the Junkin Act.

Reliance is also placed upon a statement made to Dee Eiche by W. G. Sabine about the time of the establishment of the State Tire Company. Mr. Eiche said: "Well, he (Sabine) said they were going to go after the business and he said it might be a little tough for a while on the rest of the boys, but they were going to get their business in Lincoln, they hadn't been getting it to that time." This statement in no sense of the word indicates that anything other than fair competition was to be employed in its drive for business. The statement also had reference to all the competitors of the Goodrich Company, with no special reference to the plaintiff.

This fragmentary evidence of an intent to injure plaintiff, together with all the other evidence in the case, fails in our judgment to establish a violation of the Junkin Act. The alleged overt acts, together with the evidence of wrongful motives, fail to sustain a violation of the act as construed in *Marsh-Burke Co. v. Yost, supra,* and *State v. Interstate Power Co.,* 118 Neb. 756, 226 N. W. 427.

The law applicable may be stated as follows:

A combination or conspiracy between two or more persons against any person, firm or corporation to damage or destroy the business of such person, firm or corporation, which is carried into effect, is a violation of the Junkin Act (Comp. St. 1929, art. 8, ch. 59) and subjects such wrong-doers to an action for damages.

A conspiracy need not be established by direct evidence of the acts charged, but may, and generally must, be proved by a number of indefinite acts, conditions and circumstances, which vary according to the purposes to be accomplished. The evidence as a whole must show by a pre-

ponderance, however, the intent of the alleged wrong-doers to accomplish a result prohibited by the statute.

When the alleged overt acts are in themselves lawful, and the evidence does not tend to show an unlawful intent to conspire against and injure the business of another by stifling competition, the action must fail for want of proof.

A person may do business with whomsoever he desires. He may likewise refuse business relations with any person whomsoever, whether the refusal is based on reason, whim or prejudice.

One engaged in business has the right to meet competitive prices of merchandise of similar class, character or quality, and when he does so to meet competition, he does not violate the Junkin Act.

A volume bonus, which provides for a discount to a dealer in accordance with the amount of purchases he makes, is in itself entirely lawful unless an intent be shown to grant it as a means of injuring or destroying the business of another.

A written contract, if couched in clear, unambiguous language, is not subject to construction. The intent of the parties must be deduced from the language used in the contract.

We necessarily conclude, after a consideration of all the evidence and the application of controlling principles of law, that the evidence is insufficient to support a judgment.

In view of the conclusion reached, it will not be necessary for us to consider other alleged errors occurring during the trial. The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED.

STATE, EX REL. PHILLIP FISCHER, APPELLANT, V. CITY OF LINCOLN ET AL., APPELLEES.

288 N. W. 499

FILED NOVEMBER 10, 1939. No. 30582.

1. **Municipal Corporations**: OFFICERS: REMOVAL. Where the appointing power is given unconditional authority to remove a public officer or employee at any time in its discretion, it may do so without a hearing.
2. ———: ———: ———. Even where the power of removal is not expressly conferred, the general rule is that a grant of the power to appoint is construed to carry with it, by necessary implication, a grant also of the unconditional power to remove, if the term of office is not fixed by law and the right to remove is not in any other manner restricted.
3. ———. The purpose of the home rule charter provisions of our Constitution (art. XI, secs. 2-5) was to render cities as nearly independent as possible of state legislation.
4. ———. The constitutional limitation that a home rule charter must be consistent with and subject to the laws of the state means simply that, on matters of such general concern to the people of the state as to involve a public need or policy, the charter must yield to state legislation.
5. ———. The legislature cannot, however, even by a general law, affect the powers of a city under its home rule charter over matters which are purely of local concern, or which only indirectly or remotely affect the people of the state outside the particular municipality.
6. ———. The right of a city to provide for a particular form of government in a home rule charter is in no way dependent upon whether the legislature by statutory enactment has authorized such a form, nor is it subject to the statutory conditions and limitations upon which the legislature may have authorized a city to adopt it.
7. ———. The city council of Lincoln, under the provisions of its home rule charter, had the right to discharge one of its firemen without a hearing before the council.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

Frank A. Dutton, for appellant.

Ralph P. Wilson, Clarence G. Miles and *Frederick H. Wagener, contra.*

Heard before EBERLY, PAINE, CARTER and JOHNSEN, JJ., and KROGER, District Judge.

JOHNSEN, J.

This is a proceeding in mandamus, to compel the city council of Lincoln and the chief of its fire department to reinstate relator (who will be referred to herein as plaintiff) as a fireman, on the ground that he had been discharged without a hearing. The trial court sustained a general demurrer to the petition, and, on plaintiff's election not to plead further, it dismissed the action. Plaintiff has appealed.

Plaintiff had been summarily removed from his position by the fire chief, and the city council ratified the discharge by refusing to give him a hearing. His contention is that he could not legally be removed except on formal charges, notice, and a hearing before the council.

The question accordingly is whether such charges and a hearing were required under the provisions either of the city charter or of the statutes of the state.

Lincoln is a city of the first class, with more than 40,000 and less than 100,000 inhabitants, having a commission form of government, and operating under a home rule charter. Its charter provides: "The city council * * * shall elect * * * as many officers, assistants and employees as may, in its judgment, be essential and necessary to conduct the government of the city. * * * Any such officers or any assistant or any employee appointed by the city council may be removed by the city council at any time. The city council shall have power, in its discretion, to discharge any officer or employee appointed or elected by it or to discontinue any employment or abolish any office at any time."

The charter thus expressly grants to the city council the general power both to appoint and to remove all subordinate officers and employees, at any time, in its discretion.

"A grant of general power to remove an officer from office ordinarily carries with it the right to remove him

at any time without notice or hearing." 99 A. L. R. 391, annotation.

"If the power to remove is given, expressly or by necessary implication, by words or terms denoting that it may be exercised in discretion, such power, to the extent thus given, is, *ex hypothesi,* one which may be exercised whenever in the mind and judgment of the donee of the power the fact or thing exists upon which his discretion is rested." 2 McQuillin, Municipal Corporations (2d ed.) sec. 574.

Indeed, even where the power of removal is not expressly conferred, the general rule is that a grant of the power to appoint is construed to carry with it, by necessary implication, a grant also of the unconditional power to remove, if the term of office is not fixed by law and the right to remove is not in any other manner restricted. 2 McQuillin, *op. cit.,* sec. 582; 19 R. C. L. 931, sec. 232; *Id.* 935, sec. 235; 99 A. L. R. 336, annotation; *State v. Wunderlich,* 144 Minn. 368, 175 N. W. 677; *Lyon v. Civil Service Commission,* 203 Ia. 1203, 212 N. W. 579; *State v. Archibald,* 5 N. Dak. 359, 66 N. W. 234.

In *State v. Smith,* 35 Neb. 13, 52 N. W. 700, we specifically held: "Where by law there is no fixed term of office and the incumbent holds during the pleasure of the appointing power, the power of removal is discretionary, and may be exercised without notice or hearing."

From these authorities it is clear that, in so far as the provisions of the charter are concerned, plaintiff has no ground for complaint because he was denied a hearing before the city council. The charter gives the council the power to discharge any appointee, at any time, without charges or a hearing, if it chooses to do so.

Plaintiff argues, however, that, apart from the charter, the ordinances of the city and the regulations of the fire department contemplate and entitle him to such a hearing. The petition sets out some ordinances which provide, in substance, that the chief may make such rules and regulations for the fire department as he deems advisable, with the consent of the council; that he shall keep a record of

all complaints against members and his judgment thereon; and that he may suspend from duty any member against whom a complaint has been made, until he has had an opportunity to examine the charges. Certain regulations of the fire department are also pleaded, which provide that preferred charges against a member must be made in writing and forwarded through the company officer to the chief; that officers shall report promptly to the chief, by well-sustained charges, any transgression of laws, ordinances, rules or orders; and that both company officers must sign any charges brought against a member.

These ordinances and regulations obviously are intended to provide a means of bringing grievances and complaints to the attention of the chief in an orderly and routine fashion; to require him to examine any charges made, for purposes of departmental discipline; and to enter a notation of his judgment or conclusion, presumably as a matter of service record exoneration or demerit. It may be supposed that, in getting at the facts of any situation, a fair-minded investigation will ordinarily include a discussion of the complaint with the person involved, even though there be no prescription for a formal hearing. But the legal concern in this case is not whether plaintiff was afforded such an opportunity for discussion with the chief; the controlling question is whether he could legally be discharged without a hearing before the city council. The ordinances and regulations cited involve, as we have indicated, only departmental routine and procedure. They do not, either expressly or by implication, make provision for a hearing before the city council, nor purport to impose any limitation upon the right of the council, under its plenary charter powers, to remove a fireman at any time and in any manner that it chooses to do so. Indeed (though the matter need not be determined here) there is substantial authority to the effect that a discretionary power of removal conferred by a charter cannot validly be limited by ordinance. 43 C. J. 652; 19 R. C. L. 931, sec. 232.

The city council, accordingly, had power, under the pro-

visions of the charter, to remove plaintiff without giving him a hearing. The remaining question is whether he was entitled to a hearing as a matter of statutory requirement.

Plaintiff relies upon the following provision of section 19-413, Comp. St. 1929: "Before any such officer or employee (appointed by the city council) can be discharged charges must be filed against him before the council and a hearing had thereon, and an opportunity given such officer or employee to defend against such charges." In *State v. City of Lincoln,* 101 Neb. 57, 162 N. W. 138, it was held that this provision was at that time applicable to the city of Lincoln. Lincoln was then operating, however, under such grants of power as had been made to it by statutes of the legislature, and not under a home rule charter.

The purpose of section 2, art. XI of the Constitution of Nebraska, providing that any city with more than 5,000 inhabitants "may frame a charter for its own government, consistent with and subject to the Constitution and laws of this state," was to render such cities as nearly independent as possible of state legislation. *Consumers Coal Co. v. City of Lincoln,* 109 Neb. 51, 189 N. W. 643. Liberal judicial construction has encouraged this salutary assumption by municipalities of the powers and responsibilities of local self-government. *Sandell v. City of Omaha,* 115 Neb. 861, 215 N. W. 135; *State v. City of Milwaukee,* 190 Wis. 633, 209 N. W. 860. Recurrently we discover that democracy is only the hearth-shadow of local self-government and try to preserve the crackle of its flame.

The extent of the powers which may be incorporated in a home rule charter was defined in *Consumers Coal Co. v. City of Lincoln, supra,* as follows: "We hold that the city may by its charter under the Constitution provide for the exercise by the council of every power connected with the proper and efficient government of the municipality, including those powers so connected, which might lawfully be delegated to it by the legislature, without waiting for such delegation. It may provide for the exercise of power on subjects, connected with municipal concerns, which are

also proper for state legislation, but upon which the state has not spoken, until it speaks."

The constitutional limitation that a home rule charter must be consistent with and subject to the laws of the state simply means, therefore, that on matters of such general concern to the people of the state as to involve a public need or policy, the charter must yield to state legislation. This includes, as Judge Cardozo points out in his concurring opinion in *Adler v. Deegan,* 251 N. Y. 467, 490, 167 N. E. 705, 713, matters which, in a direct and substantial manner, are the subject of state concern, even though they may be also proper concerns of the municipality. In this latter field, however, until the superior authority of the state has been asserted by a general statutory enactment, the city may properly act under its charter. But in matters which are purely of local concern, or which only indirectly or remotely affect the people of the state outside the particular municipality, the provisions of a home rule charter will control over conflicting statutory enactments. *State v. City of Milwaukee, supra.* And the legislature cannot, even by a general law, affect the powers of a city under its home rule charter over matters which are essentially municipal affairs. *Pester v. City of Lincoln,* 127 Neb. 440, 255 N. W. 923; *City of Portland v. Welch,* 154 Or. 286, 59 Pac. (2d) 228, 106 A. L. R. 1188. The basic difference between a city operating under a home rule charter and one operating under statutory authorization is that the former's powers of local self-government are derived wholly from its charter, while the powers of the latter are dependent upon the extent of the grant which the legislature has made and the conditions and limitations which the statutes have imposed.

In contending that, in view of section 19-413, Comp. St. 1929, the city could not discharge plaintiff without giving him a hearing before the council, plaintiff has overlooked the fact that this statute was not operative against the city of Lincoln, after it adopted its home rule charter. The application of the statute is limited and it is not de-

signed to declare a general public policy. It is not a requirement imposed upon cities of the state generally, nor even upon all cities of a particular class, but is merely a condition or prescription made against such cities as desire to avail themselves of the optional right to adopt a commission form of government under the authority granted by the legislature in article 4, ch. 19, Comp. St. 1929. No such prescription has been attempted against cities operating under the statutes which authorize the general mayor and council system of government. If the city of Lincoln at the present time was operating its commission form of government under authority derived from the legislature, as it was at the time *State v. City of Lincoln, supra,* was decided, then, under the holding in that case, it would be subject to the prescription for a hearing which section 19-413, Comp. St. 1929, imposes. In adopting a home rule charter, however, the city had the right to make provision therein for any form of local government it desired, which was not in conflict with the letter and spirit of our Constitution. Its right to adopt a particular form of government was in no way dependent upon whether the legislature, by statutory enactment, had authorized such a form, nor was it subject to the statutory conditions and limitations upon which the legislature had authorized a city to adopt it. *People v. Perkins,* 56 Colo. 17, 137 Pac. 55; *In re Pfahler,* 150 Cal. 71, 88 Pac. 270. The requirement, in section 19-413, Comp. St. 1929, for a hearing before the council, therefore, had no application to the powers conferred by and exercised under the home rule charter.

Whether the legislature could, by general law and as a matter of public policy, require that no fireman in the state be discharged without a hearing before the city council is not now before us. No such statute is here involved. Nor do we have the right to pass upon the wisdom of the policy which the inhabitants of Lincoln have thus seen fit to adopt in their charter. All we can declare is that no question exists under present laws as to their power to do so. It may be added, for informational purposes, but without any

implication, that no pension rights are here involved, because the city of Lincoln is not required to provide a pension for its firemen. Comp. St. 1929, sec. 35-201.

For the reasons which have been set out, plaintiff cannot complain of the fact that the city council refused to grant him a hearing, nor can he claim that by virtue thereof his discharge was invalid. The trial court properly held that he was not entitled to a writ of mandamus to compel his reinstatement on that ground.

AFFIRMED.

HARRY H. ASHBROOK, APPELLANT, V. MARGUERITE BRINER ET AL., APPELLEES.
288 N. W. 374

FILED NOVEMBER 10, 1939. No. 30655.

1. **Mortgages.** A deed, absolute in form, given as security for the payment of money, passes the legal title to the grantee.
2. ———. Where such deed is accompanied by a defeasance in writing, the legal title does not pass to the grantee, and the transaction constitutes a mere mortgage.
3. ———. Where two instruments are executed at the same time, as part of the same transaction, and to accomplish a definite purpose, they will be construed together as one instrument in determining their effect and the intention of the parties.

APPEAL from the district court for Sioux county: EARL L. MEYER, JUDGE. *Reversed, with directions.*

Schnurr & Mumby and *F. J. Reed,* for appellant.

G. H. Seig, contra.

Heard before SIMMONS, C. J., EBERLY, PAINE and MESSMORE, JJ., and CHAPPELL and KROGER, District Judges.

KROGER, District Judge.

This is an action to quiet title to 1,600 acres of land in Sioux county, Nebraska, and from an order dismissing plaintiff's action against two of the defendants, this appeal is prosecuted.

The record discloses the following facts: On March 20, 1925, Burwell R. Price was the owner of the real estate in question and on said date executed and delivered to his father, James W. Price, a warranty deed conveying said real estate to said James W. Price. On the same date, and as a part of the same transaction, a defeasance contract was executed and acknowledged by the same parties, wherein it was stated that the conveyance was as security for a loan of $7,000, which was to be due and payable in five years, with interest at 6 per cent., and that upon the payment of said loan said James W. Price was to reconvey said premises to Burwell R. Price, or to any other person whom he might, in writing, designate.

The loan of $7,000 had not been repaid when, on December 12, 1933, James W. Price died testate, a resident of Jefferson county, Iowa. Burwell R. Price, however, had retained possession of the real estate, had collected the income therefrom and paid the taxes thereon, and had paid the interest on the loan to the father up to the time of his death. James W. Price left surviving him his widow, Mary A. Price, and two sons, Burwell R. Price and B. Elroy Price. By the terms of his will certain real estate and all personal property, excepting some bank stock, were given to Mary A. Price as her absolute property, and the income of the bank stock and other real estate were given to her for life. The will further provided that upon the death of Mary A. Price all property, both real and personal, should be divided into two equal shares, one of which was to go to Burwell R. Price absolutely, and the other share to Burwell R. Price, as trustee for the benefit of B. Elroy Price and the children of B. Elroy Price. This trust was in the nature of a spendthrift trust and resulted from the fact that Ella G. Price, the wife of B. Elroy Price, had obtained a divorce and an alimony judgment, and the will provided that the trust should continue until the alimony judgment was released, or until the death of Ella G. Price, or until the death of B. Elroy Price, whichever should first occur. In the event of the release of the alimony judgment

or the death of Ella G. Price, then the trust was to terminate and the proceeds turned over to B. Elroy Price to be his absolute. In the event, however, that B. Elroy Price, should die before either of the other contingencies happened, then the proceeds of the trust fund were to be paid to the children of B. Elroy Price, who are Helen Mona Price and Dorothy A. Guinotte.

On January 8, 1934, an inventory of the assets of the estate of James W. Price was filed in the probate court of Jefferson county, Iowa, wherein the conveyance and contract between Burwell R. Price and James W. Price were listed as personal property.

On November 15, 1934, Burwell R. Price entered into a written contract for the sale of the land in controversy to Harry H. Ashbrook, plaintiff in this action, and on February 6, 1935, executed and delivered a warranty deed to said premises in favor of plaintiff.

On January 12, 1935, a petition was filed in the county court of Sioux county, Nebraska, by Mary A. Price and Burwell R. Price, as executors of the estate of James W. Price, praying that said will be admitted to probate as a foreign will, and thereafter said instrument was duly admitted to probate as a foreign will and probate proceedings were completed.

On January 2, 1936, plaintiff filed his original petition in this action, and on July 14, 1936, filed his amended petition on which the case was tried. Ella G. Price, former wife of B. Elroy Price, and his children, Helen Mona Price, Dorothy A. Guinotte, and Joseph Guinotte, husband of Dorothy A. Guinotte, were the only defendants to appear and contest plaintiff's action. All other defendants defaulted.

The trial court found that Ella G. Price had no interest in said real estate and title was quieted as against her and all other defendants, excepting Helen Mona Price and Dorothy A. Guinotte, and as against their contingent interest plaintiff's action was dismissed.

It is the theory of the plaintiff that the conveyance of

March 20, 1925, was a mortgage in fact, and that legal title to the premises did not pass to James W. Price by such conveyance, and that Burwell R. Price was still the owner of the legal title to said premises, which title was conveyed to the plaintiff by the deed executed and delivered February 6, 1935; that the interest of James W. Price in said premises was a chattel interest, or personal property, and that upon his death it became the absolute property of Mary A. Price, his widow.

It is the contention of the defendants that the conveyance of March 20, 1925, did pass the legal title to James W. Price, and that upon his death title passed to his devisees under the provisions of his will.

Defendants further contend that the only interest which Burwell R. Price had in the premises after the execution of the deed of March 20, 1925, was the right of redemption, and that he waived this right of redemption when he petitioned to have the will of James W. Price admitted to probate in Sioux county as a foreign will; and that in consequence of such waiver the defendants, Helen Mona Price and Dorothy A. Guinotte, have a contingent interest in said premises by reason of the trust created for the portion of the estate going to their father, B. Elroy Price.

This court is committed to the rule that, where a warranty deed is executed and delivered for the purpose of securing an indebtedness owing from the grantor to the grantee, the legal title passes to the grantee and the only interest retained by the grantor is the right of redemption. *Northwestern State Bank v. Hanks,* 122 Neb. 262, 240 N. W. 281.

Where, however, a deed, absolute in form, is given as security for the payment of money, and is accompanied by a defeasance in writing, it has been held to constitute a mere mortgage and the grantor retains all the rights of a mortgagor. *Connolly v. Giddings,* 24 Neb. 131, 37 N. W. 939.

Here we have two instruments executed as a part of the same transaction, to wit, a warranty deed and a contract

of defeasance, and it has been held that, where two instruments are made at the same time with reference to the same transaction and to effectuate the same purpose, they will be construed together to the same extent as though made in one instrument. *Standard Oil Co. v. O'Hare*, 126 Neb. 11, 252 N. W. 398.

It is a well-settled principle that a court of equity will consider the substance and not the form, and that the particular form or words of a conveyance are unimportant if the intention of the parties can be ascertained.

In this state the usual form of mortgage differs but slightly from the wording of the two instruments executed in this case, if the same are construed together and treated as one instrument; and so construing them, it is apparent that the parties intended the conveyance as a mortgage and not as a transfer of the legal title with the right of redemption.

Particularly is this true in view of the provisions of section 76-228, Comp. St. 1929, where we read as follows: "Every deed conveying real estate, which, by any other instrument in writing, shall appear to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage; and the person for whose benefit such deed shall be made shall not derive any advantage from the recording thereof, unless every writing operating as a defeasance of the same, or explanatory of its being designed to have the effect only of a mortgage, or conditional deed, be also recorded therewith and at the same time."

In the instant case there was such other instrument in writing which clearly shows that the conveyance was intended only as security in the nature of a mortgage, and James W. Price, when he recorded the deed, did not record the defeasance contract. If we were to hold that the deed conveyed the legal title, we would be, in effect, ignoring the above provision of the statute, which states that, under the circumstances existing in this case, "though it be an absolute conveyance in terms, shall be considered as a

mortgage;" and giving James W. Price an advantage from the recording thereof in violation of the statute just quoted.

In view of the conclusion arrived at, it is unnecessary to consider the defense that Burwell R. Price, by his act in having his father's will admitted to probate as a foreign will, waived his right of redemption. In passing, it may be said that the record does not indicate any intention to make such a waiver. A contract for the sale of the land in controversy was entered into some months before the petition to probate the will was filed, and less than a month after the filing of the petition a deed was executed and delivered to the plaintiff. Whether the filing of the petition for probate was due to the forgetfulness of the attorney for the estate, as he testified, or whether it was done with the thought that the title could be perfected in that manner, is immaterial, as, in any event, it does not show a clear intention to waive any interest which Burwell R. Price had in the premises.

We therefore hold that the deed and defeasance contract executed March 20, 1925, are to be construed together and, when so construed together, they constitute a mortgage given as security for the payment of a debt, and that the legal title did not pass to James W. Price; since the interest which James W. Price had was that of a mortgagee, it was a chattel interest and passed under his will as personal property and, as a consequence, Helen Mona Price and Dorothy A. Guinotte have no interest therein and the trial court erred in dismissing plaintiff's action as to them.

The judgment of the trial court is reversed and the cause remanded to enter decree in accordance with this opinion.

REVERSED.

THELMA HILL, APPELLEE, V. INTERSTATE TRANSIT LINES, APPELLANT.
288 N. W. 508

FILED NOVEMBER 17, 1939. No. 30552.

1. Appeal. The rule heretofore adopted by this court, "that a verdict will not be disturbed when there is evidence tending to support it does not apply where the verdict is opposed to the undisputed physical facts," is not applicable where there is a reasonable dispute as to the pertinent physical facts.
2. Trial. Where a litigant desires to offer all of a deposition in evidence, the proper procedure is to offer the deposition by question and answer, and thereby give the opposing party opportunity to object to the admission thereof, and also give opportunity to the trial court to rule thereon, subject to the statutory limitations applicable to depositions.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

Thomas F. Hamer, George C. Holdrege and *William J. Schall,* for appellant.

Clare B. Davey and *Gray & Brumbaugh, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and JOHNSEN, JJ.

SIMMONS, C. J.

This case is an action for damages for personal injuries arising as a result of a collision between an automobile in which the plaintiff was riding and a passenger bus owned and operated by the defendant company. There was a verdict for the plaintiff in a substantial amount. The defendant appeals. The seriousness of the plaintiff's injuries is not questioned; neither is the amount of the verdict attacked as excessive.

Defendant in this appeal claims that the verdict is not supported by the evidence and is contrary to it; that the court erred in the refusal to admit certain testimony; and that the jury were erroneously instructed.

The accident occurred about 11 a. m., December 25, 1935,

near Keystone Junction, Iowa. At that time, the weather was very cold, and the wind was blowing from the northwest. It had been snowing. Whether the snow was falling or being picked up and carried by the wind is not certain.

At the point of the accident, the highway was paved, and ran due east and west through level country. The pavement was 18-feet wide. There was an expansion joint down the center line of the pavement, and on either side of that joint were two painted black lines about 12 inches apart. Snow was on the pavement in many places. The plaintiff was riding in a light coupé, either owned or controlled by her, driven by her brother-in-law. The defendant's bus was a standard passenger bus with a maximum width of eight feet, weighing 10 tons when loaded.

Plaintiff and her brother-in-law were driving west. Defendant's bus was traveling east, was behind schedule, and at the immediate time of the accident was traveling at a speed of 30 to 35 miles an hour.

A snowplow was proceeding west along the north side of the highway at a speed of 10 to 15 miles an hour. The snow was drifting across the highway at points, and when the plow came in contact with the snow, flurries were thrown into the air and were carried southeast by the wind.

The plaintiff's car had been following the snowplow for some distance. Shortly after the bus passed the snowplow, the collision occurred. The distance traveled by the bus after passing the snowplow and before the collision is in dispute.

The primary question of fact to be determined was the location of the car and the bus at the time of the collision with relation to the center line of the pavement. There is a dispute as to all facts bearing on that question. The plaintiff's car was pushed some 40 feet backward to the northeast, and came to rest headed northwest with its front wheels in the ditch, its rear wheels off the pavement on the shoulder. It was practically demolished. The pictures of the car, which are in evidence, were taken after the car

had been removed to a garage. The bus was damaged on the left bumper, light, and fender. If pictures were taken of the bus, they were not offered in evidence. The fender brace was bent so that the front wheels could not be turned to the left and were forced slightly to the right. This would account for the bus' angling to the right and coming to a rest off the pavement on that side.

The driver of plaintiff's car was killed almost instantly, and accordingly his testimony could not be had. Plaintiff's testimony is that they were some distance behind the snowplow on the right side of the center line of the pavement when the bus passed the snowplow, came out of the snow flurries, headed northeast with its front left wheel a foot or more across and north of the center line of the pavement, and ran into the plaintiff's car immediately thereafter, without fault on the part of the plaintiff or the driver of her car.

Defendant's testimony was that the bus was south of the center line of the pavement at all times, and that, just as it was passing the snowplow, the plaintiff's car came out from behind the snowplow, turned across the center line into the right lane of traffic in front of the bus, and that the collision occurred on the south half of the pavement. Several witnesses testified to certain marks on the pavement which support defendant's theory of the case. However, the existence of the marks, their point of beginning and what caused them is in dispute. Defendant's theory is that the marks were caused by the rim or tire of the left front wheel of plaintiff's car as it was hurled backward. An examination of the rim and tire was not made before the car was removed. There is a conflict as to the position of the tire and the rim on the car following the collision. There is no clear testimony as to the condition of the tire. There is testimony that the bus turned slightly to the right when it passed the snowplow. The bus was almost as wide as the half of the pavement. Any slight turn back to the left after passing could readily have put the bus across the center line in the position testified to by the plaintiff.

There is sufficient evidence in the record to sustain plaintiff's contention and the jury's finding that the accident occurred when the car in which she was riding was on the north half of the pavement. The case is controlled by the law of Iowa. The parties agree that the plaintiff should recover if the accident occurred as a result of the bus being north of the center line of the pavement.

To this situation we apply the well-recognized rule that, if there is testimony before a jury by which a finding in favor of the party on whom rests the burden of proof can be upheld, the verdict will not be disturbed.

Defendant urges the application of the following rule as controlling in this case:

"The rule that a verdict will not be disturbed when there is evidence tending to support it does not apply where the verdict is opposed to the undisputed physical facts of the case, or is in flat contradiction of recognized physical laws, and where the testimony presented, taken as a whole, is capable of no reasonable inference of such a state of facts as would allow the plaintiff to recover." *Dodds v. Omaha & C. B. Street R. Co.*, 104 Neb. 692, 178 N. W. 258.

However, that rule is not applicable where, as here, there is a reasonable dispute as to the pertinent physical facts. *Suhr v. Lindell*, 133 Neb. 856, 277 N. W. 381.

Defendant complains that the court erred in sustaining objections to the admission of the deposition of the plaintiff offered by the defendant. It is claimed that the deposition, taken some time before the trial, contains statements of the plaintiff contrary to those made at the trial. The plaintiff in her cross-examination was questioned as to certain of those statements. At the opening of its case in chief, the defendant offered "in evidence the deposition of Thelma Hill." After objection thereto and considerable argument, the court admitted in evidence certain questions and answers from the deposition which were read to the jury. The defendant then renewed "its offer of the deposition of the plaintiff, Thelma Hill, as a whole." The deposition was not received in evidence. In its motion for a new

trial, the defendant stated that "the court erred in refusing to receive the deposition of the plaintiff, Thelma Hill, in evidence." The defendant assigns as error in this court that the trial court "erred in refusing to admit the deposition of the plaintiff, Thelma Hill, in evidence." It will be noted that both the offer and the assignment of error go, not to the refusal to admit specific questions and answers, but to the deposition as a whole.

The proper procedure in cases of this kind is to offer the deposition by question and answer, and thereby give the opposing party opportunity to object to the admission thereof, and also give opportunity to the trial court to rule thereon, subject to the statutory limitations applicable to depositions. Any other rule would permit a litigant to abuse the power of compulsory testimony by deposition and might result in the admission of testimony that would be properly excluded were the witness present on the stand. The deposition was properly refused admission for another reason:

"An assignment of error that the district court erred in refusing to admit the evidence of a certain witness will be overruled, if the record shows that a portion of the evidence was, in fact, admitted." *World Mutual Benefit Ass'n v. Worthing*, 59 Neb. 587, 81 N. W. 620.

Here certain questions and answers of the plaintiff contained in the deposition were admitted in evidence. The refusal of the trial court to admit the deposition in evidence "as a whole" was not error.

Instructions numbered 6, 7, and 7A given by the court are as follows:

(6) "The theory of the plaintiff's case is that she was riding in her car westerly following the snowplow, and she and her driver using ordinary and reasonable care, and driving on their own side of the highway, as they progressed westward, when the defendant's bus controlled by its driver, Finck, was so wrongfully controlled that it went in a northeasterly direction from its due and proper path on the highway because of the negligent control of the defend-

ant's servant, Finck, and collided with the plaintiff's car in which she was riding, and so, by reason of such negligent and wrongful control, brought about and proximately caused the collision in question and plaintiff's resulting injuries. If you find this theory of the plaintiff to be the true one and duly established by a preponderance of the evidence in plaintiff's favor, you will return your verdict for the plaintiff."

(7) "The theory of the defendant is that its bus was at all times under proper control and was being controlled without negligence in any degree, by its servant, Finck, and that it was on its right side of the highway, and progressing easterly, *and* that the collision between the plaintiff's car and the defendant's bus was brought about proximately by the plaintiff's car leaving its pathway at the north side of the roadway, and negligently being allowed to proceed westward on the roadway south of the center line of the road and in the path of the defendant's bus, while defendant's bus was proceeding eastward properly in its pathway on the south side of the roadway. If this theory of the defendant appears to be the true one in the case, then you will return your verdict generally for the defendant."

(7A) "If you find that the car in which the plaintiff was riding was on the south side of the traveled portion of the highway at the point of the accident, you are instructed that there is no evidence before you which, in any way, justifies or excuses the said car being on the south side of the traveled portion of said highway, and, then, in that event, the plaintiff was guilty of contributory negligence, and cannot recover as a matter of law, and you must return your verdict in favor of the defendant."

The defendant complains that there was prejudicial error in the giving of instruction numbered 7, in that it required that the jury find that defendant's "bus was at all times under proper control and was being controlled without negligence in any degree," and that the defendant was entitled to a verdict, even though it were negligent, if the collision occurred upon the south half of the highway, be-

cause the record does not show any legal excuse for the plaintiff's car being on the south side of the highway, if such were the fact.

An examination of these three instructions does not disclose prejudicial error. The court by instructions 6 and 7 set out the theories of the parties as to the evidence. Defendant suggests that the conjunctive "or" should have been used instead of the conjunctive "and" which we have italicized. Clearly, such a statement would not have expressed defendant's theory of the case as disclosed by its answer and its evidence. Instruction 7A is approved by the defendant. The three instructions, when read together, clearly limit the question of defendant's liability to the issue as to the location of the cars at the point of the collision. The other assignments have been considered and prejudicial error not found.

The judgment of the trial court is

AFFIRMED.

JOHNSEN, J., not participating.

CARTER, J., dissenting.

I am unable to agree with the majority opinion in this case. The sole question to be determined, in a final analysis of the case, is the location of the motor vehicles involved at the time of the accident.

The positive evidence of six witnesses who examined the pavement is that all marks from the bus and the automobile involved in the accident lead back to a point south of the center line of the highway, the side of the highway being traveled by defendant's bus. For instance, Dewey Waychoff, a farmer living near the scene of the accident, and called by the plaintiff as a witness, testified: "Q. These scratches that you observed, were they in the snow or what? A. They were in the pavement and snow. * * * Q. Did you notice just where the west end of this scratch began? A. Yes; I saw south of the black line they started. * * * Q. How far was the first scratch you noticed from the center lines? A. You mean how far south or over the black line? Q. Yes; if you know. A. Oh, I would say five

or six inches over." John R. Burrows, the county coroner, testified as follows: "Q. What examination did you make? * * * A. I examined the pavement. Q. What marks did you see there on the pavement, Mr. Burrows? * * * A. There were different marks on the highway, or scratches on the highway. Q. In which direction were they from the automobile? A. They were in a southwesterly direction from the automobile. Q. Did you notice where they led? A. Yes. Q. Where did they lead? A. To a portion of the pavement directly south of the black line painted on the pavement. * * * Q. How far (south) of the south black line were these marks that led over to the car? A. Approximately one foot." Kenneth Rhoades, state highway patrolman, testified: "The marks led from the north side of the pavement where the débris was off the shoulder, in a circle, a trifle of a circle, southwesterly direction over and just beyond the tar, the center tar stripe on the highway." Three employees of the defendant testified to the same facts as the foregoing witnesses. The only testimony produced to meet this evidence is that of two witnesses who stated that they observed no marks on the south half of the pavement. They did not testify that they looked for marks, nor to any other fact that would indicate that the evidence was other than the result of a failure to observe. This being true, the physical facts are not disputed and should control the result of the litigation. With the physical facts established, it is clear that plaintiff's driver turned across the center line to pass the snowplow into the path of the bus coming from the opposite direction.

The bus driver testified that he was driving on the right side of the highway, and as he was passing the snowplow, the car in which plaintiff was riding loomed up in the storm directly in his path. Harold J. Davis, a merchant of Tama, Iowa, and a passenger on the bus, testified that the bus was on the right side of the highway and that plaintiff's car darted over in front of it. Mrs. Emma Cox of Marshalltown, Iowa, also a passenger on the bus, testified that, before the bus had cleared the snowplow, "the car

tried to pass the snowplow, and it swerved around the snowplow, coming directly on the south side towards the car, or the bus." W. P. Cox of Huron, South Dakota, also a passenger on the bus, testified as follows: "Q. Now, as I understand you, you saw a black object about the time the bus and snowplow met? A. Yes, sir. Q. Where was it? A. Well, it appeared from behind the snowplow and swung out. Q. Had you seen it before the bus and snowplow met? A. No, sir; I had not. Q. Could you see as they met which way it was headed? A. It was headed across the road, towards the bus; yes, sir." The evidence of these disinterested witnesses is not only very convincing, but it is in line with the undisputed physical facts established in the record.

The only evidence in the record that supports the finding of the jury is that of plaintiff herself. She says that the bus was on the wrong side of the road when the accident occurred. Her testimony is impeached by at least three other witnesses. The record shows that Arthur L. Bye, court reporter of the Eighteenth judicial district of Iowa, took a statement from plaintiff the day following the accident, and testified that a part of it was as follows: "Q. Just prior to the collision, you were asleep, you say? A. I think I probably must have been. I don't remember anything, only I know it was snowing and blowing terribly, but I do remember seeing this snowplow ahead of us there, at that time or one other time, I don't remember now which it was. Q. But you do remember seeing it just ahead of you? A. No. Q. Prior to the collision? A. I don't remember seeing anything or anything about the collision." The coroner, Mr. Burrows, also testified that plaintiff told him that she was probably asleep. The highway patrolman Rhoades testified that the day after the accident he went to the hospital to interview plaintiff. His version is reported in the record as follows: "Q. Did you see Thelma Hill? A. I did. * * * Q. What was she doing? A. Smoking a cigarette, when I first went in. Q. Did you observe her as you talked to her, as to whether she seemed to be bright?

A. She talked bright, yes, sir, when I observed her." "Q. Did you ask her to tell you what she knew about the accident? A. Yes, sir; I did. Q. And what did she say to you in reply? A. She said that at the time of the accident she was either dozing or sleeping, and that she knew nothing about it."

I submit, therefore, that the undisputed physical facts require us to hold for the defendant. But, in addition thereto, we have the evidence of all the disinterested eyewitnesses who reconstruct the accident in conformity with the undisputed physical facts. And, in addition to all this, plaintiff's testimony as to how the accident occurred, upon which the verdict must rest if it is to be sustained, is impeached to such an extent that it is not worthy of belief. In my opinion, the evidence preponderates in favor of the defendant as a matter of law, and the judgment should be reversed.

CITY OF CURTIS, APPELLANT, V. MAYWOOD LIGHT COMPANY ET AL., APPELLEES.
288 N. W. 503

FILED NOVEMBER 17, 1939. No. 30630.

1. **Municipal Corporations.** Under the provisions of Initiated Law No. 324 (Comp. St. Supp. 1937, ch. 70, art. 6), as the business of maintaining and operating a municipal electric plant and selling current therefrom is wholly outside the truly governmental powers and functions of such city, the place of furnishing or receiving the electric current would be in no manner controlled by the situs of the same with reference to the corporate boundaries of the cities involved in the transaction.
2. ———. Where a municipality is given power, under circumstances then existing, to furnish public utility service beyond its corporate limits, it has the right to provide service within the corporate boundaries of another municipal corporation.
3. ———. Contract here in suit adjudged not *ultra vires*, but, under the terms of the statutes controlling, clearly within the powers of the city of Curtis to lawfully make.

APPEAL from the district court for Frontier county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Wells, Martin, Lane & Offutt, for appellant.

Butler, James & McCarl, Fred J. Schroeder, Harold Johnson and *Robert H. Downing, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ., and KROGER, District Judge.

EBERLY, J.

This is a suit in equity prosecuted by the city of Curtis, Nebraska, the principal relief sought being to secure the rescission and annulment of a contract of purchase and sale, in writing, bearing date of March 23, 1936, executed by plaintiff herein, and the Maywood Light Company by Harry Hall, sole owner thereof, and also Harry Hall and Hazel Hall, his wife. Pursuant to this contract of purchase, there had been sold, transferred and conveyed to the city of Curtis "a certain franchise, which is more specifically described in Ordinance No. 51 of the village of Maywood, Nebraska (the same being a 25-year franchise from and after the 20th day of June, 1930, and obligating the grantee to furnish electric current at the rates and for the purposes therein set forth to the village of Maywood and to its inhabitants) ; all of the electric distribution system now in operation in the village of Maywood, Nebraska, including all poles, lights, wires, transformers, meters, and all equipment belonging to said electric distribution system and two substations, being on each end of the transmission line between Maywood, Nebraska, and Curtis, Nebraska, and all transmission lines between Maywood and Curtis, Nebraska, and all right of way upon which said transmission line is located; the easement upon lot four of block eleven, in the village of Maywood, Nebraska; all right under a certain contract for joint use of specified poles, to which contract Harry Hall and the Maywood Carrico Telephone Company of Maywood, Nebraska, are parties." In consideration of which the city of Curtis had accepted and received said property, including the proper assignment of said franchise, executed and delivered

as the purchase price therefor its revenue warrants in the sum of $35,000, payable solely from the revenue and earnings of its electric light and power plant, and thereupon entered into possession of the property purchased, which it operates in connection with and by electric current generated in its own electric light and power plant at Curtis, Nebraska, which was owned and operated by it at the time of making the contract. It had also engaged in supplying electric current for the purpose of power, heat and light to its patrons situated in the village of Maywood from the 23d day of March, 1936, which it continued without interruption after the commencement of this action. So far as the record before us is concerned, the transaction was accepted and approved by the village of Maywood, though that village is not a party to this proceeding.

The relief sought was based on a claim that the contract of sale entered into was *ultra vires* and void, and plaintiff asked for the annulment and rescission thereof, and of the unpaid portion of the warrants outstanding, and for other relief incident thereto necessary to restore the original *status quo* formerly existing as to all parties who had become interested in the transaction. Without detailing the course of litigation, it may be said that, after all parties to the proceeding had filed their respective pleadings, all the defendants filed a motion for judgment on the pleadings, which was sustained by the trial court and the action dismissed, that court's finding in support of its judgment being "that the contract of March 23, 1936 * * * was within the powers of the city of Curtis to make and enter into, and is authorized by the statutes of Nebraska, and that the warrants issued pursuant to said contract are not void as beyond the authority of the plaintiff city, but are authorized by the statutes of Nebraska and are valid." From the judgment and finding plaintiff prosecutes this appeal.

Appellant's contention is, viz.: "That the city of Curtis had no corporate power to acquire, own and operate the distribution system and electric plant which was located inside the corporate limits of the village of Maywood and

had no power to acquire, own and exercise the franchise granted by the village of Maywood for the construction and operation of the electric plant and distribution system within its borders."

All parties to this controversy agree that the proper disposition of the same is dependent upon a correct interpretation of art. 6, ch. 70, Comp. St. Supp. 1937. This is Initiated Law No. 324, which, in the proper manner, was duly submitted to and adopted by the electorate of this state. The title of this act, so far as here involved, includes, viz.: "An act relating to cities, villages, and public electric light and power districts engaged in the generation, transmission, distribution, purchase and/or sale of electrical energy for lighting, heating and power purposes; to provide for the extension, by any city, village, or public electric light and power district of its electric light and power plants, transmission lines and service outside of the boundaries of such municipality or district; to provide for interconnection of electric light and power plants, lines, systems and service by and between cities, villages and public electric light and power districts in this state; to authorize the pledging or hypothecating of the net earnings and profits of publicly-owned electric light and power plants, lines or systems, to pay for property necessary or useful in the operation of such plants, lines or systems; * * * and to make applicable to cities, villages and public electric light and power districts, the general provisions of law concerning private electric light and power companies as to eminent domain, right of way and physical construction and maintenance of electric light and power plants, lines and systems." Laws 1931, ch. 116.

The provisions of this enactment applicable to the situation and to the arguments and contentions of the several parties here, are the following, viz.:

"Section 1. Any city, village, or public electric light and power district within the state, which may own or operate, or hereafter acquire, or establish, any electric light and power plant, distribution system, and/or transmis-

sion lines may, at the time of, or at any time after such acquisition or establishment, extend the same beyond its boundaries, and for that purpose is hereby authorized and empowered to construct, purchase, lease, or otherwise acquire, and to maintain, improve, extend, and operate electric light and power plants, distribution systems and transmission lines, outside of the boundaries of such city, village, or public electric light and power district, for such distance and over such territory within this state as may be deemed expedient. In the exercise of the powers granted by this section any such city, village, or public electric light and power district may enter into contracts to furnish and sell electrical energy to any person, firm, association, corporation, municipality, or public electric light and power district. No such construction, purchase, lease, acquisition, improvement, or extension of any such additional plant, distribution system and/or transmission lines, however, shall be paid for except out of the net earnings and profits of one or more or all of the electric light and power plants, distribution systems and transmission lines, of such city, village, or public electric light and power district. The provisions of this act shall be deemed cumulative and the authority herein granted to cities, villages and public electric light and power districts, shall not be limited or made inoperative by any existing statute.

"Section 2. For the purpose of selling or purchasing electrical energy for lighting, heating or power purposes, any city, village, or public electric light and power district in this state is hereby authorized to enter into agreements to connect and interconnect its electric light and power plant, distribution system and/or transmission lines with the electric light and power plant, distribution system and/or transmission lines of any one or more other cities, villages, or public electric light and power districts in this state, upon such terms and conditions as may be agreed upon between the contracting cities, villages and public power districts."

The clear legislative intent evidenced by the foregoing

enactment is controlling. The economic views entertained by the membership of this court can in no manner and in no degree affect the solution of the question here presented. On the contrary, proper discharge of judicial duty must clearly recognize that "The legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Johnson v. United States*, 163 Fed. 30, 18 L. R. A. n. s. 1194. See *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U. S. 381, 59 S. Ct. 516.

The intention of the legislature is here to be obtained primarily from the language used in the enactment, which must be given effect according to its plain, obvious meaning. *Gibson v. Peterson*, 118 Neb. 218, 224 N. W. 272; *State v. City of Lincoln*, 101 Neb. 57, 162 N. W. 138; *State v. Farmers Irrigation District*, 98 Neb. 239, 152 N. W. 372; *State v. Bratton*, 90 Neb. 382, 133 N. W. 429; *Goble v. Simeral*, 67 Neb. 276, 93 N. W. 235.

The exact words of the statute empower the city of Curtis to extend its electric light and power system "beyond its boundaries, and for that purpose (it) is hereby authorized and empowered to construct, purchase, lease, or otherwise acquire, and to maintain, improve, extend, and operate electric light and power plants, distribution systems and transmission lines, outside of the boundaries of such city, * * * for such distance and over such territory within this state as may be deemed expedient." But, not satisfied with an absolutely unconditional grant of power, which manifestly and necessarily includes the right to operate within the domain of other cities or villages, the legislature has added thereto the words, "The provisions of this act shall be deemed cumulative and the authority here-

in granted to cities, villages * * * shall not be limited or made inoperative by any existing statute." In this connection it may be said that, obviously, statutes are the sole source of municipal rights and powers. In addition, section 2, quoted above, necessarily contemplates that one city may carry on the business of selling electrical current within the corporate boundary of another "upon such terms and conditions as may be agreed upon between the contracting cities." Indeed, we have but to give force and effect to clear and unambiguous language of this statute to sustain the transaction here involved in all its details, as well as to affirm the findings of the trial court, wholly unmodified. Nor, in so doing, do we in any manner depart from the principles of municipal law established by our decisions. In a case involving the operation of water-works owned and operated by a municipality, Fawcett, J., in delivering the opinion of this court, in *Henry v. City of Lincoln*, 93 Neb. 331, 140 N. W. 664, employed the following language with reference to municipal corporations, viz.:

"It is entitled to these privileges and immunities (governmental in nature) because of the fact that the functions and duties above referred to are imposed upon it by law and it must discharge and perform them; but here the duties imposed upon it by law cease. It is no part of its duty, as a municipal corporation, to engage in a purely business or commercial enterprise. When it seeks and obtains from the legislature permission to engage in such an enterprise, its act in so doing is purely voluntary on its part, and it thereby assumes a third relation, separate and distinct from the dual relations above considered. While occupying this third relation no governmental functions or corporate duties, as a municipality, devolve upon it. It is then engaged in an ordinary business enterprise, and is bound by all the rules of law and procedure applicable to any other private corporation or person engaged in a like enterprise. It has no greater or higher privileges or immunities than are possessed by any other private corporation. It is subject to the same liabilities and entitled to the same defenses; no more and no less."

In the case of *Cook v. City of Beatrice*, 114 Neb. 305, 207 N. W. 518, the principles above quoted were reaffirmed, and, in addition, the principle was announced that, "in maintaining its electric plant and selling current therefrom, the city of Beatrice was acting outside its governmental functions and corporate duties." It was thereby engaging in an ordinary business enterprise in which it inherently possessed no greater or higher privileges or immunities than those possessed by any other private corporation.

These conclusions are sustained by the following authorities: *Crandall v. Town of Safford*, 47 Ariz. 402, 56 Pac. (2d) 660; *Keever v. City of Mankato*, 113 Minn. 55, 129 N. W. 158; *City of Colorado Springs v. Colorado City*, 42 Colo. 75, 94 Pac. 316; *Pikes Peak Power Co. v. City of Colorado Springs*, 105 Fed. 1, 44 C. C. A. 333; *Muir v. Murray City*, 55 Utah, 368, 186 Pac. 433; *City of Tucson v. Sims*, 39 Ariz. 168, 4 Pac. (2d) 673; *City of Henderson v. Young*, 119 Ky. 224, 83 S. W. 583; *Milligan v. City of Miles City*, 51 Mont. 374, 153 Pac. 276; *Larimer County v. City of Fort Collins*, 68 Colo. 364, 189 Pac. 929; *Incorporated Town of Sibley v. Ocheyedan Electric Co.*, 194 Ia. 950, 187 N. W. 560.

On principle, it would follow that, as the business of maintaining and operating a municipal electric plant and selling current therefrom is wholly outside the truly governmental powers and functions of such city, the place of furnishing or receiving the electric current would be in no manner controlled by the situs of the same with reference to the corporate boundaries of the cities involved in the transaction.

The following authorities support the contention that, where a municipality is given power under the circumstances then existing to furnish public utility service beyond its corporate limits, it has the right to provide service within the corporate boundaries of another municipal corporation. *Crandall v. Town of Safford, supra; Kansas Gas & Electric Co. v. City of McPherson*, 146 Kan. 614, 72 Pac. (2d) 985; *Muir v. Murray City, supra; City of Colorado*

Springs v. Colorado City, supra; City of Omaha v. Omaha Water Co., 218 U. S. 180, 30 S. Ct. 615, 54 L. Ed. 991.

The conclusion therefore follows that the contract sought to be rescinded as *ultra vires*, under the terms of the statutes controlling, was clearly within the powers of the city of Curtis to make.

The judgment of the trial court as to all parties to this proceeding is in all respects correct, and it is

AFFIRMED.

CARTER, J., dissenting.

The only question in this case is whether the city of Curtis had the power to acquire the franchise granted by the village of Maywood and to own and operate the electric plant and distribution system within the corporate limits of the village of Maywood and sell electric energy direct to its inhabitants. As a premise for the discussion to follow, it cannot be disputed that a municipal corporation is a creature of statute. Its powers are limited to those granted in express terms, those reasonably implied from, or incident to, powers expressly granted, and those essential to the declared objects and purposes of the municipality. Special grants of power are to be strictly construed, and all doubt will be resolved against the existence of a power, rather than in favor of it. The rule generally is that a power not granted is withheld.

The legislature has authorized villages to grant franchises to and make contracts with any person, company or association for the purpose of granting to such person, company or association the furnishing of electric energy. Comp. St. 1929, sec. 17-440. Authority to grant such a franchise to another municipality was not granted, and consequently the village of Maywood had no power to grant a franchise to the city of Curtis. Clearly, if the city of Curtis was not a proper party to obtain such a franchise directly from the village of Maywood, it cannot subvert the statute and obtain one by assignment.

Neither is the city of Curtis authorized by statute to take or own a franchise from another city or village. The initi-

ated act before us, chapter 116, Laws 1931, authorizes cities and villages to extend their electric light and power systems beyond their corporate boundaries, to enter into agreements to connect and interconnect its electric light and power system with those of other cities and villages, and to enter into contracts to furnish and sell electric energy to any person, firm, association, corporation, municipality or public electric light and power district. We necessarily arrive at the conclusion that the village of Maywood is without power to grant a franchise to the city of Curtis for the privilege of providing electrical energy, and the city of Curtis has no authority to take or own such a franchise.

To permit a city or village to invade the territorial limits of another municipality and assume governmental or proprietary powers therein creates a conflict of jurisdiction and authority disadvantageous to both. Questions as to tax exemptions, eminent domain, control of rates, the compelling of adequate service, and the right of condemnation by the invaded city or village, create a field of political confusion which ought not be permitted in the absence of a statute expressly authorizing it. I submit that the language used in the act conclusively establishes an intent to avoid such a situation by withholding any such grant of authority to the cities and villages of this state. The attempt of the city of Curtis to take, own and operate under the franchise granted to the Maywood Light Company is, in my judgment, wholly unlawful, and the judgment of the district court ought to be reversed.

SIMMONS, C. J., and JOHNSEN, J., concur in dissent.

PETER MAUL, APPELLANT, V. IOWA-NEBRASKA LIGHT & POWER COMPANY, APPELLEE.

288 N. W. 532

FILED NOVEMBER 17, 1939. No. 30751.

1. **Workmen's Compensation.** Evidence examined and *held* to establish that appellant suffered an injury resulting from an accident arising out of and in the course of his employment.

2. ———: COMPENSABLE INJURY. "Injury from strain or overexertion due to a physical condition predisposing the employee to injury is an injury within the terms of the Nebraska workmen's compensation act, even though had the person been sound in every particular the strain would not have been sufficient to occasion any serious physical injury." *Dymak v. Haskins Bros. & Co.*, 132 Neb. 308, 271 N. W. 860.
3. **Appeal.** Hearsay evidence tending to prove a material fact, if admitted without objection, may sustain a finding of the existence of that fact. The probative force of such evidence is for the trial tribunal vested with the function of ascertaining facts to determine.
4. **Evidence.** "Cogent reasons that strengthen the opinion of an expert witness as to a scientific fact in issue and tend to weaken opposite expert opinions not so supported may determine the issue." *Flesch v. Phillips Petroleum Co.*, 124 Neb. 1, 244 N. W. 925.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Reversed, with directions.*

Chambers, Holland & Locke, for appellant.

Lee & Sheldahl, contra.

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

EBERLY, J.

This proceeding is an appeal to this court by Peter Maul, appellant and plaintiff, to reverse a judgment entered in the district court for Lancaster county on December 3, 1938, in favor of the Iowa-Nebraska Light & Power Company, defendant and appellee herein, and against the appellant, denying his petition for workmen's compensation and dismissing his action.

The claims of Peter Maul, as set forth in the pleadings, are: That on November 27, 1937, as he was performing his work for the defendant company, he stumbled and fell, while carrying a bundle of pipe for the defendant company, and he thereby sustained an injury to the first and second lumbar vertebræ of his spine. It is also charged by plaintiff that this accident and the physical results occasioned

thereby accelerated and lit up a general arthritic condition of his spine, which had theretofore not been disabling, to such an extent that thereafter he became totally and permanently incapacitated to perform any work and labor, which prior to said accident he was capable of performing. The defendant light and power company in its pleadings, in effect, denies the happening of the claimed accident and all other claims made by plaintiff. The record discloses that the Nebraska compensation court found that these injuries in suit arose out of and in the course of plaintiff's employment, and awarded him compensation and medical benefits. Thereafter, on appeal, after trial *de novo,* the district court for Lancaster county reversed the award and denied the plaintiff recovery. Now, on this appeal, plaintiff contends that the findings of fact as made by the district court in this case are not conclusively supported by the evidence as disclosed by the record; that plaintiff is entitled to a trial *de novo* therein (Comp. St. Supp. 1937, sec. 48-174); and that the district court erred in its denial of his petition.

The evidence discloses, without contradiction, that on November 9, 1938, plaintiff Maul was 58 years of age; that immediately prior to November 27, 1937, he had been employed by the Iowa-Nebraska Light & Power Company as a laborer for 16 or 17 years; that this employment was "steady." Maul's testimony is that during the 16 years he laid off only three times, and then because he had "an awful cold;" that during the last year immediately preceding November 27, 1937, he had not laid off at all on account of ill health; that he was able to do his part of the work, and was "earning the same wage that other men were earning working right with him."

In the early afternoon of November 27, 1937, plaintiff, together with three other employees of the defendant company, under the immediate supervision of defendant's foreman, was engaged in carrying "inch and a quarter" pipe from a box car across a neighboring street and into defendant's "pipe house." These pipes, the record discloses, were tied in bundles of some five or six each, which weighed

approximately 125 pounds a bundle. Each bundle was being carried by two men, the ends of the bundle resting on the shoulders of the carriers. Extending into this pipe shop, at right angles to one of its inclosing walls, is an elevated portion of the floor. This elevation is quadrilateral in shape and kept in place by bordering planks set on edge and secured by stakes. Thus constructed, it forms an obstruction to the passer-by from four to six inches high. It is referred to in the record as a platform. On the afternoon in question, while engaged in carrying a bundle of pipes and passing in the vicinity of this elevation, plaintiff's right foot came in contact therewith causing him to stumble and fall to the ground. This contact, it appears, was near the corner of this platform as it extended into the shop. The jar suffered from the fall was of course increased by the weight then being carried by plaintiff. As to Maul's position at the time of this fall, with reference to the platform, the foreman testifies: "Out far enough so when he grabbed his side with his right hand and kind of brought his foot that way (indicating) he was past the platform like that (indicating);" he was away from the corner of the platform "in the neighborhood of two and two and a half" feet. Plaintiff testifies that he did not feel any pain before he stumbled, but immediately afterwards a pain "hit him" in the "right lower part of (his) stomach." He grabbed his lower right side with his hand and manifested great pain. He was unable to stand up when they attempted to raise him to his feet, saying, "That hurts too much." The foreman had the workmen bring over a small tool box to where Maul was lying, and when some coats had been thrown upon it, Maul was picked up and laid over on it on his stomach, and he rested in that position with his knees on the ground and his chest and stomach over the tool box. The boys called an ambulance right away, and when it arrived went to the hospital with Maul. He was taken to St. Elizabeth Hospital of Lincoln, where the company doctor or surgeon took him in immediate charge. We have in the record what is referred to as exhibit 13. It is the complete record of Peter Maul's

case, as far as the hospital is concerned. It comprises 31 pages. It includes the records of attending physicians, by nurses, and from the laboratories. The first entry bears date "11-27-37" and the last "12-31-37." The record further discloses the following at the trial on this case in the district court, viz.: "Mr. Sheldahl (attorney for the Iowa-Nebraska Light & Power Company): We offer exhibit 13 in evidence. Mr. Holland (attorney for Maul): No objection. Exhibit 13 received in evidence and the same is attached to this bill of exceptions on the following page and made a part hereof."

It is to be noted that statements contained in exhibit 13 do not come to us under sanction of the customary oath. Strictly speaking, the recitals and facts therein contained are hearsay.' A possible exception exists as to the written report and findings of Czar Johnson, M. D., bearing date of December 6, 1937, who, prior to the commencement of the trial in the district court, had departed this life. Other evidence in the record discloses that Dr. Czar Johnson was called in consultation by the attending physician, Dr. Blum, and that Dr. Czar Johnson participated in an examination of Peter Maul, and in his written report and findings we have the result of Dr. Johnson's professional examination. His conclusions and findings are that the disabilities and injuries, under which Maul was suffering at the date of the examination, were traumatic in their origin, and tend to sustain a recovery in Maul's behalf in the present action.

"Said a learned judge: 'What a man has actually done and committed to writing when under obligation to do the act, it being in the course of the business he has undertaken, and he being dead, there seems to be no danger in submitting to the consideration of the jury.'" 1 Jones, Evidence, Civil Cases (4th ed.) sec. 319. See cases in note 14, page 594 of foregoing citation; also *Lassone v. Boston & Lowell R.*, 66 N. H. 345, 24 Atl. 902.

Without a determination of the matter above presented, we shall consider all statements of exhibit 13 as hearsay, presented to the court by the Iowa-Nebraska Light &

Power Company, and, without objection of the opposing attorney, admitted in evidence by the trial court. On this subject, we are committed to the rule, viz.: "Hearsay evidence tending to prove a material fact, if admitted without objections, may sustain a finding of the existence of that fact. The probative force of such evidence is for the jury and not for the court to determine." *Metz v. Chicago, B. & Q. R. Co.*, 88 Neb. 459, 129 N. W. 994. See, also, *Sheibley v. Nelson*, 84 Neb. 393, 121 N. W. 458. It follows that each statement contained in exhibit 13 is for the proper consideration of this court in this trial *de novo*, to be given such weight as its intrinsic nature, taken in consideration with the other evidence in the case and circumstances in connection therewith, may justify. But, the rule appears to be, "Hearsay testimony admitted without objection may sustain a finding based solely thereon. *Sheibley v. Nelson*, 84 Neb. 393." *Metz v. Chicago, B. & Q. R. Co.*, 88 Neb. 459, 129 N. W. 994.

That Maul actually suffered an injury on November 27, 1937, seems to be established by his physical condition, which appears somewhat baffling to the company doctor and the consultant which the company doctor called to his assistance. The following is included in the cross-examination of the company doctor on the subject of his professional treatment of the plaintiff, viz.:

"Q. In fact, if the thing had been done that you wanted to do at one time in this case, his stomach would have been opened and his abdomen cavity explored for what you might have been able to find? A. That is right. Q. You believe now your diagnosis on that was wrong? A. I do. * * * Q. And at that time you wrote down in your hospital notes you couldn't be sure of diagnosis on it? A. Well, I couldn't be sure. I am not familiar with what I reported. Q. That is true anyway? A. Yes. Q. On November 28th, the following day, you thought it might be his heart? A. That is right. Q. On November 30th you thought it might be pleurisy? A. That is right. Q. And on December 1st, you thought that the signs suggested an appendicitis and you

advised a laparotomy? A. That is right. Q. Also on that date, as I note from the hospital records, you said and wrote in there, 'I favor acute gall-bladder.' That is there, isn't that? A. That was the thing I thought he probably had. Q. In other words, there was no question in your mind as to whether or not Mr. Maul was a malingerer or faker at the time he was in the hospital? A. Oh, he was having pain. Q. His complaints were real then, weren't they? A. That was obvious. * * * Q. Doctor, a while ago you said that you believed this man had become a malingerer because of the fantastic diagnosis of his doctor,—you made that statement? A. Right. * * * Q. Now according to what you said, I take it you don't think there is anything wrong with Mr. Maul's back now? A. I don't think anything wrong except chronic arthritis. Q. He said he can't tie his shoes. Do you think he could? A. No, I don't. I don't think you can put a man in a brace for a year and expect him—a man who has arthritis, of his age, and his station of nutrition, as obese as he is—to reach over and tie his shoes. I don't doubt that statement. Q. Is that physical disability or mental? A. Well, it has become physical disability. * * * Q. Well, you say this man never mentioned his back to you? A. That is right. Q. Isn't it true, however, that the day you left this case Dr. Blum came in and started immediate treatment to his back? A. That is right."

In like manner, the eminent physician who was called in by the company doctor as a consultant, and who with the company doctor had entire charge of the case for the first four days, testified:

"Q. And in other words, you and Dr. Witham suggested that this man's stomach be cut open and his stomach be explored to find out what was wrong? A. That is right. Q. And Dr. Blum came along and said, 'No, gentlemen, this isn't the thing to do?' A. Several hours after, too. Q. Several hours after, but the same day? A. Yes, sir. Q. And this man followed Dr. Blum's advice? A. Yes, sir. Q. And he has never had any surgery since, has he? A. He had relief right away, didn't he? Q. What is that? A. He had

relief right promptly? Q. You are answering the questions. He has never had any surgery since? A. No, sir. Q. And you don't recommend any surgery today? A. Absolutely not."

Another medical expert called by the defendant was Dr. J. E. M. Thomsen, whose cross-examination is as follows:

"Q. Doctor, you told us a lot about the back this morning. I want to confine my questions to one subject and that is, the thing you say that troubles this man now. You now say he has an osteoarthritis in his back? A. Yes. * * * Q. And you believe, do you not, that he has a disability in his back at the present time? A. Yes, I think he has some disability in his back at the present time. Q. You think you know definitely what the disability is from? A. Yes, in the back. Q. In the back? All right, what is your opinion, the wearing of the brace so long a time? A. No, I think it is because he has this extreme osteoarthritis. Q. You have no history in this case of this man ever laying off a day in sixteen years from arthritis, have you? A. No, sir. Q. Yet, as I understand it, you now say that the disability now is because of the osteoarthritis? A. I believe he has a disability in his back due to osteoarthritis. Q. Doctor, do you mean that the disability from his osteoarthritis has become manifested since November 27, 1937? A. I don't know."

Dr. Rowe, another medical expert, testifying in behalf of the defendant company, testified, in part, as follows (after being shown exhibits 35 to 44, inclusive, being X-rays of Maul's spine): "Q. What do they show, just generally? A. My judgment is they show signs of arthritis, which is very common in men over 45 years of age; shows the exostosis or bony growth about the margin of the vertebræ, more particularly the lower dorsal and the lumbar area and chalky deposit in the ligaments in several places which may be seen between the portions of the vertebræ; also the signs of arthritis are present in the articular facets of the lateral portions of the vertebræ, and in addition there is definite signs of injury to the cartilage, which is caused by the arthritis. * * * Q. Well, now, does this man

have what you call an osteoarthritis? A. Yes. Q. Is that in itself always disabling? A. No, sir. Q. May it become disabling by a fall or twist of some kind? A. It may; yes."

The evidence conclusively establishes that Peter Maul for 16 or more years had put in his life at continuous hard labor. He had had an accident on November 27, 1937. At the time of the accident, and prior thereto, he had been afflicted with osteoarthritis, but it had not been disabling previously, but was latent in its characteristics. The real question is whether the accident was the exciting cause of the activation of the disease and hence his disability. There can be no question but that he was totally and permanently disabled at the time of the trial in the district court, and that his trouble was a back injury, though the medical evidence on this last point is in hopeless conflict.

In *Dymak v. Haskins Bros. & Co.*, 132 Neb. 308, 271 N. W. 860, it is stated: "The facts in the instant case invoke the application of the well-recognized principle, viz.: 'Injury from strain or overexertion due to a physical condition predisposing the employee to injury is an injury within the terms of the various workmen's compensation acts authorizing compensation for injuries, personal injuries, accidental injuries, or personal injuries by accident, even though had the person been sound in every particular the strain would not have been sufficient to cause his death or provoke any serious physical injury.' 71 C. J. 607. See, also, *Bunker v. Motor Wheel Corporation*, 231 Mich. 334, 204 N. W. 110; *Hackley-Phelps-Bonnell Co. v. Cooley*, 173 Wis. 128, 179 N. W. 590."

As already suggested, the expert medical evidence in this record is conflicting and irreconcilable. We are committed to the view that traumatic arthritis is compensable. *Flesch v. Phillips Petroleum Co.*, 124 Neb. 1, 244 N. W. 925. Also, that injury from strain accelerating a pre-existing weakened or diseased condition of the employee's back is compensable. *Dymak v. Haskins Bros. & Co.*, 132 Neb. 308, 271 N. W. 860. As a résumé it may be stated that on and prior to November 27, 1937, Maul had been continu-

ally engaged in hard labor. He was afflicted with osteoarthritis of his spine, but it had never been disabling. On that day he stumbled and fell, and the effect of his fall was accentuated by the weight that then rested on his shoulder. Dr. Rowe tells us that a spine which is subject to osteoarthritis may become disabling by a fall or twist of some kind. From the time of this fall on November 27, 1937, Peter Maul's disability has been continuous, and is evidenced in a manner consistent with the theories of his medical witnesses. These facts, in the light of the entire record, afford cogent reasons that strengthen the opinions of the expert witnesses as to the scientific facts in issue in the instant case, and tend to weaken opposite expert opinions not so supported, and determine the issue. *Flesch v. Phillips Petroleum Co.*, 124 Neb. 1, 244 N. W. 925.

It follows that we find the allegations of Peter Maul's petition to be established by a preponderance of the evidence in the record; that prior to the accident of November 27, 1937, he had been in good health, and the testimony supports the claim of latent osteoarthritis; and that the accident was the exciting cause of the activation of the disease which has resulted in total permanent disability, and entitled him to have and receive the award as originally made and entered in the workmen's compensation court.

Therefore, the judgment of the district court is reversed and the cause remanded, with directions to enter judgment in favor of Maul as herein determined.

REVERSED.

The following opinion on motion for rehearing was filed January 19, 1940. *Former opinion and judgment modified.*

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

PER CURIAM.

This matter coming on to be heard upon defendant's motion for a rehearing addressed to the opinion hereto-

fore adopted in this case and reported *ante*, p. 128, 288 N. W. 532, we deem the opinion and judgment entered therein correct, except as to two items, as to which the opinion should be modified and judgment entered therein amended, viz.: (1) It appears that the average weekly wage of complainant Maul for six months immediately preceding the accident in suit was but $20, which would entitle him to an award of but $13.33 a week as compensation for the period as determined, and no more. (2) It also appears that the proof received in evidence on the trial in the district court as to bill for services rendered by Dr. Czar Johnson is insufficient to sustain the allowance thereof; that the same should be disallowed *in toto* and should not constitute a part of the award made.

Under the facts established by the record in this case, attorney fees on appeal for plaintiff's attorneys may not be allowed.

The opinion heretofore adopted and judgment entered therein will, therefore, be modified to conform to the determination here made, and, as thus modified, will be adhered to. The motion for a rehearing is denied.

JUDGMENT ACCORDINGLY.

STATE OF NEBRASKA, APPELLEE, V. A. B. HAUSER, APPELLANT.
288 N. W. 518

FILED NOVEMBER 17, 1939. No. 30461.

1. **Municipal Corporations.** A prosecution for the violation of a city ordinance, while in form a criminal prosecution, is in fact a civil proceeding to recover a penalty.
2. **Criminal Law.** If an act be an offense against the state and also against a municipality of the state, the same act may constitute an offense against both the state and the municipality, and both may punish it without infringing any constitutional right.
3. **Jury.** The purpose of constitutional provisions guaranteeing the right of trial by jury was to preserve the right as it existed at common law and under the statutes in force when the Constitution was adopted.

4. ———. The legislature may prescribe that petty offenses, not recognized as crimes by the statutory or common law existing at the time of the adoption of the Constitution, may be determined without the intervention of a jury without offending constitutional provisions on the subject.
5. ———. Where the offenses of drunkenness and driving a motor vehicle while intoxicated are created by ordinance, with a fine of $50 fixed as the maximum penalty for the violation of either, they will be classed as petty offenses which may be determined by a police magistrate without a jury, as provided by section 18-205, Comp. St. 1929.
6. ———. On an appeal to the district court from a judgment of the municipal court imposing a penalty for the violation of a city ordinance, the defendant is entitled to a jury trial under the express provisions of section 18-203, Comp. St. 1929.

APPEAL from the district court for Lancaster county: ELLWOOD B. CHAPPELL, JUDGE. *Reversed.*

Lloyd E. Chapman, for appellant.

Clarence G. Miles and *Frederick H. Wagener, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

CARTER, J.

Defendant was charged with drunkenness and driving a motor vehicle while intoxicated, contrary to the ordinances of the city of Lincoln. After conviction in the municipal court, an appeal was taken to the district court. Defendant was again found guilty, and fines were imposed for both offenses. From this judgment and sentence defendant appeals.

The ordinance under which defendant was charged provides that (a) it shall be unlawful for any person to drive any motor vehicle on the streets of the city while under the influence of intoxicating liquor, and (b) if any person shall be found in a state of intoxication, or under the influence of alcoholic liquor, he shall be deemed guilty of a misdemeanor. Lincoln Municipal Code, sec. 19-212.

The statutes of this state in force at the time the offense was committed provide that it shall be unlawful for any

person to operate any motor vehicle while under the influence of intoxicating liquor. Comp. St. Supp. 1937, sec. 39-1106. And, also, if any person shall be found in a state of intoxication, or under the influence of alcoholic liquor, he shall be deemed guilty of a misdemeanor. Comp. St. Supp. 1935, sec. 53-374.

It is the contention of defendant that the subsequent acts of the legislature, making the offenses charged crimes under the laws of the state, amount to a legislative occupation of the field, and abrogate existing ordinances on the same subject and deprive municipalities of the power to legislate thereon in the future. While this is undoubtedly the law in many states, it has been well settled in this state that, if an act is an offense against the state and also against a municipality of the state, the same act may constitute an offense against both the state and the municipal government, and that both may punish it without infringing any constitutional right. *City of Brownville v. Cook,* 4 Neb. 101. The ordinance involved herein prescribes a maximum penalty of $50 for its violation. It must therefore be classed as a petty offense. The ordinance being one authorized by the legislature by virtue of section 15-208, Comp. St. 1929, we necessarily hold that under the circumstances here existing it constitutes a valid exercise of the police power of the city.

The record shows that the defendant demanded and was denied a jury trial in the district court. It is the contention of the defendant that this is in violation of sections 6 and 11, art. I of the Constitution, which provide that the right of trial by jury shall remain inviolate, and that in all criminal prosecutions the accused shall have the right to a speedy public trial by an impartial jury. We have held that the purpose of these provisions was to preserve the right of trial by jury as it existed at common law and under the statutes in force when the Constitution was adopted. *Bell v. State,* 104 Neb. 203, 176 N. W. 544. "Minor offenses were, at the common law, and before the adoption of the state Constitutions, tried by magistrates and justices of

the peace without a jury. It is therefore a general rule that to these cases the constitutional provision does not apply." 16 R. C. L. 207, sec. 25. We have also held that a prosecution for the violation of a city ordinance, while in form a criminal prosecution, is in fact a civil proceeding to recover a penalty. *McLaughlin v. State,* 123 Neb. 861, 244 N. W. 799. At the time of the adoption of our Constitution, the offenses now under consideration were not recognized as crimes by the common law or any statute then in existence. It is clearly within the province of the legislature to authorize the addition of petty offenses to certain classes of subjects previously triable without a jury. *State v. Kacin,* 123 Neb. 64, 241 N. W. 785. The legislature, by section 18-205, Comp. St. 1929, has provided that cases in the police court for violation of a city ordinance shall be tried by the police magistrate without the intervention of a jury. This same provision has been adopted by the city of Lincoln by ordinance. Lincoln Municipal Code, sec. 24-104. It is clear, therefore, that defendant was properly tried in municipal court by the police magistrate without a jury. See *State v. Parks,* 199 Minn. 622, 273 N. W. 233. The only question remaining is whether defendant was entitled to jury trial in the district court after an appeal was taken from the judgment and sentence of the municipal court.

We have heretofore demonstrated that the accused could be deprived of a jury trial of the offenses charged without offending constitutional requirements. It will be noted, however, that the applicable statute, section 18-205, Comp. St. 1929, only provides for a trial without a jury in the municipal court. The statute providing for an appeal to the district court says in part: "And shall deliver such transcript with all files and the recognizance in the case to the clerk of the appellate court, who shall thereupon enter the cause upon the criminal appearance docket of the court, together with the date of filing of the transcript and recognizance, the date and amount of recognizance, the names of the sureties and the amount of costs taxed in the police court, whereupon the case shall be considered as of record

in such court and *shall be proceeded upon as provided by law in cases of appeals in criminal cases from the justice of the peace courts.*" Comp. St. 1929, sec. 18-203. (Italics ours.) It cannot be questioned that the general jurisdiction of a justice of the peace in criminal cases goes to those cases which require jury trials, not only in the justice court but in the district court on appeal as well. We are obliged to hold, therefore, that the legislature in saying that such case "shall be proceeded upon as provided by law in cases of appeals in criminal cases from the justice of the peace courts" thereby prescribed that the accused should have a jury trial of his cause in the district court. To hold otherwise would be to disregard the express direction of the legislature as to the manner that appeals from the municipal court are to be determined on appeal.

We necessarily conclude that the trial court erred in denying the defendant a jury trial in the district court. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

ANSBACHER-SIEGLE CORPORATION, APPELLANT, V. MILLER CHEMICAL COMPANY, APPELLEE.
288 N. W. 538

FILED NOVEMBER 17, 1939. No. 30624.

1. **Principal and Agent.** Where a party contracts to make another his agent to sell his goods exclusively, in consideration of the purchase of a certain amount of such goods within a specified time, a breach of the contract by such party subjects him to liability for the damages caused thereby.
2. ———. Where the continuance of a sales contract is dependent upon payment for purchases of merchandise as they become due, the making of a renewal contract by the parties after payments for merchandise become delinquent amounts to a waiver of the breach.
3. **Contracts.** A contract in which a manufacturer gives another a sales agency in a specified territory, and in which the other agrees to purchase a definite amount of the manufacturer's

products each year and to press their sale to the exclusion of other competing lines, is not void for want of mutuality.

4. **Principal and Agent.** The measure of damages for the breach of such a contract is such an amount as would compensate the party injured for all damage or detriment proximately caused by the breach, including profits lost which can reasonably be proved during the life of the contract.
5. **Contracts.** When a contract has no fixed period of duration, the law ordinarily implies that it shall endure for a reasonable time. What constitutes a reasonable time must be determined from the general nature and circumstances of each case.
6. **Evidence** examined and *held* sufficient to sustain the verdict of the jury.

APPEAL from the district court for Douglas county: WILLIAM A. DAY, JUDGE. *Affirmed.*

Paul I. Manhart, M. J. Buckley and *Levin, Rosmarin & Schwartz,* for appellant.

Herbert T. White, contra.

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

CARTER, J.

This action was brought by the plaintiff to recover $1,873.74 for goods sold and delivered to the defendant. The defendant counterclaimed for damages for breach of a contract making the defendant a sales and distributing agent of plaintiff's products in a specified territory. The verdict and judgment were for defendant in the sum of $1,139.60, and plaintiff appeals.

The undisputed evidence shows that goods belonging to plaintiff were placed with defendant with the understanding that they were to be paid for at jobbers' prices as they were sold. At the time of trial defendant had sold goods belonging to plaintiff for which the sum of $860.40 was owing to the plaintiff. Defendant had on hand goods of the value of $733.32 belonging to plaintiff. Defendant offered to confess judgment for $860.40, and tendered back the remaining goods in open court. The trial court instructed

the jury to find that plaintiff was entitled to a judgment for $860.40 on its petition. Under the state of the record the trial court properly instructed the jury in this respect, there being no controverted issue of fact for the jury to determine in connection therewith. The only issues to be determined on this appeal, therefore, are those raised by defendant's counterclaim.

The record discloses that plaintiff was engaged in the manufacture and sale of insecticides, fungicides and other chemical products. The defendant was a jobber of similar products in Omaha. In 1931 the defendant entered into an oral agreement with the plaintiff by which it was agreed that defendant would purchase at least one car-load of insecticides from the plaintiff each year and the plaintiff would, in addition thereto, store another car-load of insecticides in defendant's warehouse to be paid for by defendant when and if taken from the warehouse stock. Defendant further agreed to close out all competing lines of insecticides and sell only those of the plaintiff. This oral agreement was carried out and renewed from year to year until January 22, 1936, when a written agreement was entered into, making the defendant corporation a sales agency of plaintiff. A few days later the president of the defendant company returned the written contract to the western representative of the plaintiff company. It is the contention of defendant that the contract was returned at the request of plaintiff's representative upon the representation that it was not in accord with the regulations of the insecticide industry, that it was desirable to take up the written contract to avoid controversies with competitors, but that its terms would be carried out. Plaintiff contends that its representative informed defendant that unless he paid up the amount owing to plaintiff it would be impossible to continue defendant as a jobber and exclusive sales agency, that defendant refused to pay its account with plaintiff and informed plaintiff's representative that the contract would be returned. The telephone conversations, letters and circumstances surrounding the return of the written contract

were gone into in detail. The matter was clearly for the determination of the jury, and its finding thereon, favorable to defendant, will not be disturbed.

The record shows that defendant ordered a car-load of insecticides on February 3, 1936, as required by the contract. The order was never filled. Notice of the termination of the contract was not given. Agents and officers of the plaintiff corporation refused to answer defendant's letters or to answer the telephone calls of defendant's officers. Plaintiff placed its sales agency for defendant's territory with a Kansas City firm. It is for this alleged breach of contract that defendant claims damages.

The record shows that defendant was indebted to plaintiff and that the indebtedness was past due. Plaintiff contends that this was a violation of the contract which warranted its cancelation. The evidence shows that payments had been irregularly made by defendant on its running account with plaintiff over the whole four-year period of their business relationship. At the time the written contract was entered into on January 22, 1936, defendant's account was past due. No change had taken place up to the time plaintiff refused to fill defendant's order. The plaintiff, instead of acting upon the breach of contract, proceeded to enter into a new contract for the year 1936. This was a waiver of the breach. This court has said:

"Where the aggrieved party does not act upon the breach by the other of the terms of a contract, but does anything which draws on the other party to execute its agreement after default in respect to time, or which shows it is deemed a subsisting agreement after such default, it will amount to a waiver, as will also a failure to avail oneself of it at the first fit occasion and before or when the other begins, after default, to act again on the agreement." *Elson & Co. v. Beselin & Son,* 116 Neb. 729, 218 N. W. 753.

Plaintiff contends that there was no mutuality of contract and that the alleged contract was void and unenforceable for that reason. We think there was mutuality of contract. Defendant was to purchase outright one car-load

of insecticide each year, sell plaintiff's products exclusively and pay for all plaintiff's goods sold from defendant's warehouse. Plaintiff agreed to sell at jobbers' prices less specified discounts, and to give defendant a sales agency in a specified territory. Clearly, the contract was not void for want of mutuality. In *Peck-Williamson Heating & Ventilating Co. v. Miller & Harris*, 118 S. W. (Ky.) 376, the court aptly stated the rule in a similar case as follows: "It is first insisted by appellant that the writing set out above is not a contract, because of its lack of mutuality. With this contention we are unable to agree. By the terms of the contract the parties of the second part are given the exclusive sale of appellant's furnaces, furnace fittings, etc., in the city of Bowling Green and vicinity for the term of one year. The party of the first part further agrees to bill its goods to the parties of the second part at certain discounts from the price list in its catalogue. In consideration of the prices quoted and the exclusive agency, the parties of the second part agree to sell exclusively the goods manufactured by the party of the first part, and to push their sale during the term of the contract. Here we have obligations proceeding from each party to the contract, and which are capable and possible of performance. Under such circumstances there can be no doubt of the validity of the contract."

Plaintiff contends that, as the contract had no fixed period of duration, it could be revoked by the plaintiff at any time, with impunity. We cannot agree that this is the rule where an exclusive contract is accompanied by a sale of merchandise manufactured by the plaintiff which cannot be readily replaced on the open market. The plaintiff may not revoke indiscriminately, or in bad faith, or without the giving of a reasonable notice. The rule is well stated in *Elson & Co. v. Beselin & Son, supra*, as follows: "The contract of agency being indefinite as to the time it was to run, what was its duration? Where the continuation of a contract is without definite duration the law implies a reasonable time, and what is a reasonable time is to be determined from the general nature and circumstances of the case. When the

obligor has expended a substantial sum of money or value or has substantially rearranged his business, as in this case, preparatory to engaging upon the terms of agreement for the benefit of obligee, he ought, through fairness, to have a reasonable time and notice of the cancelation of the contract in order that he might have a reasonable opportunity to put his house in order. And the notice of termination should be such as to clearly convey the intention of the parties. 13 C. J. 604, sec. 630; 6 R. C. L. 896, sec. 283." The evidence in the case at bar shows that the oral agreements preceding the written contract of January 22, 1936, were from year to year. The written contract fixed no different term for the contract to run. Under this evidence we are of the opinion that it was intended that the contract should operate for at least a year. In the absence of an operative breach of its terms, we hold, under the evidence in the record, that plaintiff could not terminate the contract with impunity before the expiration of a year.

Plaintiff also alleges that the damages allowed were excessive. The record discloses that on January 22, 1936, the date the written contract was executed, defendant had many advance orders for plaintiff's products. The president of the defendant company testified that he had orders for 50,000 pounds of insecticides, while plaintiff's representative testified that on that date he was shown orders for 15,000 pounds only. The officers of the defendant company testified that they spent large sums for advertising, soliciting and attempting to substitute other insecticides for plaintiff's products. It was also shown that defendant profited from the sale of plaintiff's products in the amounts of $1,443.57 in 1932, $2,882.13 in 1933, $2,866.16 in 1934, and $3,499.48 in 1935. In addition thereto, defendant lost many valuable customers because of an unwillingness to take a substitute product. The defendant had closed out all competing lines as required by his contract. A sudden change to a competing line naturally resulted in a substantial loss of business. The foregoing evidence is competent for the jury to consider in arriving at such sum as will fairly and

adequately compensate the defendant for the loss and damage suffered by it. The measure of damages for a breach of a contract such as we have here would be such amount as would compensate the defendant for all damage or detriment proximately caused by the breach of contract, including all profits lost from the sale of the products of the plaintiff which can reasonably be proved during the life of the contract. The jury allowed defendant damages in the amount of $2,000. The evidence is sufficient to sustain the verdict and judgment and we will not, therefore, disturb it.

Plaintiff contends that defendant's cause of action cannot properly be pleaded as a counterclaim. We think the provisions of our statute, section 20-813, Comp. St. 1929, govern the situation and require us to say that defendant's counterclaim was properly maintainable as such.

We find no prejudicial error in the record. The judgment is

AFFIRMED.

EIFEL ANSTINE, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF BANKING AND RECEIVERSHIP DIVISION, APPELLEE.

288 N. W. 525

FILED NOVEMBER 17, 1939. NO. 30684.

1. **States.** The department of banking is a governmental agency of the state, and a suit brought against such governmental agency is, in fact, a suit against the state.
2. ———. Section 48-174, Comp. St. Supp. 1937, entitled "Procedure," provides: "Upon the filing of such petition (in the compensation court) a summons shall issue and be served upon the adverse party, as in civil causes, together with a copy of the petition." Section 20-503, Comp. St. 1929, contains the requisites for a summons in civil causes and provides that it shall be directed to the sheriff of the county "and command him to notify the defendant or defendants named therein that he or they have been sued." The two preceding sections of the statute constitute the authority for the proposed issuance and service of a summons in a compensation case, wherein the state

is a party defendant. *Held* to be improper service in that the legislature has failed to provide in what manner summons may be issued and served against the state, and, therefore, violative of section 22, art. V of the Constitution of Nebraska.

3. **Statutes.** In the matter of the issuance and service of summons on a state, in the absence of a statutory provision as to the manner of serving such summons, and where the language providing for service, wherein the state is a party defendant, provides for such service only in general terms, the rule is that the state is not bound by the general words of a statute which, if applied, would operate to encroach upon its sovereign rights and injuriously affect performance of its functions, unless the contrary is declared or necessarily implied.
4. **Attorney General.** Section 84-203, Comp. St. 1929, refers to the powers and duties of the attorney general: "The attorney general is hereby authorized to appear for the state and prosecute and defend in any court or before any officer, board, or tribunal, any cause or matter, civil or criminal, in which the state may be a party or interest(ed)." As prescribed by section 84-205, Comp. St. 1929, the specific duties of the attorney general to appear and defend actions and claims against the state are insufficient, in and of themselves, to permit the attorney general to enter a voluntary appearance in the compensation court and bind the state thereby.
5. ———. The attorney general is commonly required to prosecute and defend all actions in which the state is a party or interested, but he cannot waive the immunity of the state from suit or the issuance and service of summons, and enter a voluntary appearance to make the state a party defendant, unless the statute authorizes him to do so.
6. **Statutes**: CONSTRUCTION. "In construing a statute the legislative intent is to be gathered from the necessity or reason for its enactment, and its several provisions should be construed together, in the light of the general objects and purposes of the act, so as to give effect to the main intent." *Kearney County v. Hapeman*, 102 Neb. 550, 167 N. W. 792.
7. ———: ———. The workmen's compensation law was passed by the Nebraska legislature in 1913 (Laws 1913, ch. 198). The language contained in the following sections, respectively: Section 48-106, Comp. St. 1929: "The provisions of this act (compensation act) shall apply to the state of Nebraska and every governmental agency created by it;" section 48-114, Comp. St. 1929, "'Employer' Described:" "(1) The state and every governmental agency created by it;" section 48-115, Comp. St. 1929, as amended (Laws 1913, ch. 198), "'Employee,' 'Workman' De-

fined:" "(1) Every person in the service of the state or of any governmental agency created by it," with certain restrictions; section 48-109, Comp. St. 1929, "Elective Compensation, Schedule:" "If both employer and employee become subject to Part II of this article, both shall be bound by the schedule of compensation herein provided;" section 48-172, Comp. St. Supp. 1937: "All disputed claims for workmen's compensation shall be submitted to the Nebraska workmen's compensation court for a finding, award, order or judgment;" *held*, clear and unambiguous, and the legislative intent adequately expressed to declare that the state intended to waive its sovereignty and consent to be sued in actions arising under the workmen's compensation law.

8. States. "A statute giving a court jurisdiction to hear and determine actions against the state is sufficient authority for the bringing of an action without any special statute expressly giving the consent of the state to be sued." 59 C. J. 303.

APPEAL from the district court for Lancaster county: ELLWOOD B. CHAPPELL, JUDGE. *Special appearance sustained.*

Thomas J. Dredla and *T. R. P. Stocker*, for appellant.

Walter R. Johnson, Attorney General, and *Rush C. Clarke, contra.*

Clifford L. Rein and *Charles F. Barth, amici curiæ.*

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

Eifel Anstine, on February 28, 1936, filed her petition against the state of Nebraska, department of banking, in the compensation court, to recover benefits under the workmen's compensation law, with præcipe attached, directed to the clerk of the compensation court to issue a summons for service upon the defendant as provided by law. Summons was issued and no return made thereon. The state of Nebraska, department of banking, by B. N. Saunders as superintendent, answered; the answer being signed by "F. C. Radke, C. G. Miles, Their Attorneys." An amended petition was filed by plaintiff, summons issued thereon and no return of summons made to the court. The answer to the

amended petition was signed: "State of Nebraska, Department of Banking, Receivership Division, Defendants, William H. Wright, Attorney General, Paul P. Chaney, Assistant Attorney General." Plaintiff's petition was dismissed May 24, 1937, by one of the judges of the Nebraska workmen's compensation court. A transcript was filed from the compensation court, containing a copy of the order of dismissal, stipulation and waiver of rehearing, and notice of appeal. The stipulation appears in the record in the workmen's compensation court, filed June 5, 1937, as follows: In accordance with section 48-174, Comp. St. Supp. 1937 (to which we refer), in the event of appeal of the case, it may be submitted to the district court for Lancaster county, to be heard and determined as a cause in equity and tried *de novo,* signed by F. C. Radke, Bert L. Overcash, assistant attorney general. A petition was filed by plaintiff in the district court for Lancaster county. The record does not disclose an issuance or return of summons, but a journal entry appears dated December 16, 1938, wherein the court found against the plaintiff and generally for the defendant. Motion for a new trial was filed and overruled, and notice of appeal given. The appellee filed a special appearance in this court, for the purpose of objecting only to the jurisdiction of the court over the person of this appellee, the state of Nebraska, department of banking.

It is conceded that the department of banking of the state of Nebraska is a governmental agency of the state, and that suit brought against such governmental agency is, in fact, a suit against the state, and it is also not questioned that the state cannot be sued in its own courts without its consent.

The voluntary appearance made by the attorneys representing the state of Nebraska and the department of banking is of prime importance. However, the appellee first raises a point in reference to the issuance and service of summons in the following language: That the compensation court had no jurisdiction for the reason that no service was ever had upon the state of Nebraska or the department

of banking. This proposition is of such general importance as to require discussion.

Subdivision 2, sec. 48-174, Comp. St. Supp. 1937, provides: "Upon the filing of such petition a summons shall issue and be served upon the adverse party, as in civil causes, together with a copy of the petition." Section 20-503, Comp. St. 1929, contains the requisites for a summons as in civil cases, and provides that it "shall be directed to the sheriff of the county, and command him to notify the defendant or defendants named therein that he or they have been sued."

Section 22, art. V of the Constitution of Nebraska, reads: "The state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought."

A state may, of course, lay its sovereignty aside and consent to be sued on such terms and conditions as it may prescribe. The provision of the Constitution in relation to bringing of suits against the state (art. V, sec. 22) is not self-executing. Legislative action is necessary to make it available. See *State v. Mortensen*, 69 Neb. 376, 95 N. W. 831.

Appellee directs the court's attention to section 27-319, Comp. St. 1929, under the heading: "(b) Jurisdiction in Actions Against State," and more especially to section 27-321, Comp. St. 1929, which provides for the service of summons in suits against the state. Section 27-321, *supra*, designates how the summons will be served, as follows: When a petition is filed, summons shall issue and be served upon the state by the sheriff of the county where the petition is filed, "by serving the same upon the governor and attorney general; and in any action, the subject-matter of which, in whole or in part, relates to or grew out of the conduct of any special department or institution of the government, summons shall also be served by such sheriff upon the chief officer of such department or institution."

The compensation law contains no language designating upon what officers of the state service is to be had, in the

event the state is a party to the action. See section 48-174, Comp. St. Supp. 1937. Section 20-503, Comp. St. 1929, under "Commencement of Civil Actions," provides for the service of summons in ordinary civil cases. It will be noted that section 27-321, Comp. St. 1929, contains specific language as to how summons shall be served in actions against the state, such actions being provided for in section 27-319, Comp. St. 1929. The question presents itself as to the applicability of section 20-503, Comp. St. 1929, and section 48-174, Comp. St. Supp. 1937, to the facts as presented in this case.

"It is a general rule that the state is not bound by the general words of a statute, which, if applied, would operate to trench (encroach) on its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it, unless the contrary is expressly declared or necessarily implied." 2 Lewis' Sutherland, Statutory Construction (2d ed.) 953, sec. 514.

It is obvious that section 27-321, Comp. St. 1929, does not apply, nor is said section made a part of the compensation act by express language or otherwise, but refers specifically to actions authorized by the state, as reflected by section 27-319, Comp. St. 1929, wherein the district court is made a forum for actions against the state. The use of the general language, "defendant or defendants," as appearing in section 48-174, Comp. St. Supp. 1937, and section 20-503, Comp. St. 1929, as constituting service against the state, would operate to encroach upon the state's sovereign rights, injuriously affect its capacity to perform its functions, and would establish a right of action against it in the manner which should not be permitted.

Referring again to the language contained in section 22, art. V of the Constitution, "in what manner," it is apparent that the legislature had not provided a proper manner of obtaining service upon the state in compensation cases. Section 48-174, Comp. St. Supp. 1937, uses this language, "or the voluntary appearance of a defendant is equivalent to service."

The question presented is: Can the attorney general, or his assistants, or attorney for the department of banking, or his assistants, bind the state by a voluntary appearance in a suit brought under the workmen's compensation act, wherein the state is a party defendant?

Section 84-205, Comp. St. 1929, defines the specific duties of the attorney general to appear and defend actions and claims against the state. Section 84-203, Comp. St. 1929, refers to the powers and duties of the attorney general as follows: "The attorney general is hereby authorized to appear for the state and prosecute and defend in any court or before any officer, board, or tribunal, any cause or matter, civil or criminal, in which the state may be a party or interest(ed)."

In *Custer County v. Chicago, B. & Q. R. Co.*, 62 Neb. 657, 87 N. W. 341, the county attorney entered a voluntary appearance on behalf of the county, and confessed judgment. His authority was a resolution of the county board, authorizing him to confess judgment against the county. The resolution did not authorize him to make a voluntary appearance. This court held that the judgment confessed, under such circumstances, was void. It was said (p. 661): "Where there has been no service of process to give the court jurisdiction to render judgment by confession, the law requires the personal appearance of the party or of his attorney, acting under a warrant of attorney. Code of Civil Procedure, secs. 433-437."

The duties of a county attorney are defined in section 26-901, Comp. St. 1929, and correspond to the duties of the attorney general, as heretofore stated. Section 26-901 provides in part: "It shall be the duty of the county attorney, * * * to appear in the several courts of their respective counties and prosecute and defend, on behalf of the state and county, all suits, applications or motions, civil or criminal, arising under the laws of the state, in which the state or the county is a party or interested."

The case of *Custer County v. Chicago, B. & Q. R. Co.*, *supra*, clearly held that, in the absence of a resolution by

the governing authority (in that case the county board), authorizing the act, the county attorney could not enter a voluntary appearance and bind the county thereby. If statutory enactments, setting forth the duties of the county attorney, are insufficient to permit him to appear and enter a voluntary appearance which would bind the county, then it logically follows that the duties of the attorney general, as prescribed by statute (Comp. St. 1929, secs. 84-203, 84-205), are not sufficient to authorize the attorney general to enter a voluntary appearance and bind the state, unless the governing power (the state), by legislative enactment, authorizes the attorney general to so enter a voluntary appearance in such case made and provided. The following Nebraska case supports the above analysis:

In *Chicago, B. & Q. R. Co. v. Hitchcock County*, 60 Neb. 722, 84 N. W. 97, the statute provided for service of process upon a municipal corporation under the provisions of section 57, ch. 14, art. 1, Comp. St. 1899. While required to be served upon the mayor, chairman of the board of trustees, or, in his absence, upon the clerk, etc., the chairman of the board of trustees and the city attorney entered a voluntary appearance. The court held: "A chairman of the board of trustees of a village defendant is not empowered to waive the issuance and service of summons, and to enter the voluntary appearance of the defendant in an action, without authority of the village board acting in its corporate capacity as a body politic." The court said in the opinion that the authority of the attorney and chairman of the board of trustees of a village to waive the issuance and service of summons in an action against the village, and thereby give the court jurisdiction to render a valid and binding judgment against the village, was the question to be determined. The court further said (p. 725): "There is certainly no direct authority for such action, nor does it appear to us to be based on any well recognized rule of construction to hold that such authority is lodged in a presiding officer of a municipal corporation (even though he be the officer upon whom service is required to be had) as

an implied power, under the different sections of the statute bearing on the subject. * * * The service contemplated in the foregoing section * * * is upon the corporation in its corporate capacity, and not upon an individual officer of the corporation. * * * The method by which jurisdiction over the village might be acquired was clearly pointed out in the statutes. * * * We think it a wholesome rule that, in obtaining judgments against a municipal corporation, the defendant shall be brought into court, either by a properly served process duly issued, or that in its corporate capacity it acts within the scope of the authority conferred upon it by statute, and in such manner as to show that the action taken is that of the corporation, rather than of an individual who may be a member of a body chosen to conduct the affairs of such corporation."

The following Oklahoma case presents the logical rule: In *Faught v. City of Sapulpa,* 145 Okla. 164, 292 Pac. 15, it was said (p. 183): "In the absence of a statute authorizing the officers of a political subdivision of the state to waive the issuance and service of summons for that political subdivision, this court must hold that a court does not obtain jurisdiction over a political subdivision of the state by the waiver of the issuance and service of a summons by its officers." We know of no statute that authorizes the officers of a state to waive service of summons for a political subdivision thereof.

In 24 Standard Ency. of Procedure, p. 73, it is said: "The attorney general is commonly required to prosecute and defend all actions in which the state is a party or is interested. But he cannot waive the immunity of the state from suit and enter an appearance to make it a party defendant, unless statute authorizes him to do so." Cases cited under note 15.

In opposition to the foregoing, 59 C. J. 327, is cited, wherein it is said: "Where proceedings are authorized against the state but there is no express provision as to the service of process, the state may properly be brought into court by service upon the governor and attorney general,

or apparently either of such officers." We have examined the cases cited under note 62: *Port Royal & A. Ry. Co. v. State of South Carolina,* 60 Fed. 552, in which the state instituted the action and a cross-bill was filed against it. The court held that it was proper to serve the state by making substituted service upon the attorney general, by whom the cross-bill was filed. The distinction is apparent. In *State of Texas v. Cook,* 57 Tex. 205, the legislature permitted a judge of the criminal district court to institute a suit to determine what amount of salary, if any, was due him as a judge. No mode of service was prescribed, and the court held that service on the governor or attorney general is sufficient. There is a distinct difference between an action against the state, affecting the salary of one individual, and a compensation law affecting all of the employees of the state, and the liability of the state to pay compensation for injuries received in the course of employment. The other case, cited under note 62 above, is of no assistance in determining the question.

In *California Securities Co. v. State,* 111 Cal. App. 258, 295 Pac. 583, cited, the attorney general was permitted to voluntarily appear for the state. This was an action brought to recover a corporation license tax, paid by the company under protest to the secretary of state, sued in his individual and in his official capacity. We believe that the nature of the liability created against the state by the compensation law and its effect present an entirely different situation.

Our attention is called to the case of *Keil v. Farmers Irrigation District,* 119 Neb. 503, 229 N. W. 898, wherein it was said (p. 508): "The reference to the Civil Code is manifest. So far as applicable to the transaction, and not inconsistent with the workmen's compensation act, by the language quoted the terms of this Civil Code must be considered as part of the statute." The inapplicability of the rule announced in the *Keil* case to the instant case is apparent, for the reasons hereinbefore given. The *Keil* case, in which the language was used, applied to correction of a mistake in the summons.

Section 20-853, Comp. St. 1929, is cited. Said section provides: "The court in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." The foregoing section of the statute is not applicable. Substantial rights of the state would be materially affected by the failure of the legislature to properly provide for the issuance and service of summons in compensation cases, wherein the state would be liable, or where no provision of the statute is made authorizing the attorney general, or any of his assistants, to voluntarily appear.

We conclude that the legislature has failed to provide, as required by section 22, art. V of the Constitution of Nebraska, the manner in which service of process may be had against the state, or a department of the state government, in a compensation case, or upon what officers of the state service is to be had. We further conclude that there is no statutory provision authorizing the attorney general, as the law officer of the state, to enter a voluntary appearance, binding the state, in compensation cases.

The great weight of authority is that statutes should receive a broad and liberal construction, but howsoever worthy the end to be accomplished, courts may not amend statutes under their power to liberally construe them. Such power to amend is possessed only by the legislature, and to that authority the salutary reasoning of the court and the like argument of counsel in this case might be properly addressed.

The appellee in its special appearance contends that the state of Nebraska has never waived its sovereignty and consented to be sued in actions arising under the workmen's compensation act.

The workmen's compensation law was passed by the Nebraska legislature in 1913. Laws 1913, ch. 198. The title to the act reads: "An act prescribing the liability of an employer to make compensation for injuries received by

an employee in the course of employment. Modifying common law and statutory remedies, in such cases. Establishing an elective schedule of compensation. Regulating procedure for the determination of liability and providing methods for payments of compensation thereunder." Section 6 of the act reads in part: "The provisions of this act shall apply to the state of Nebraska and every governmental agency created by it." Comp. St. 1929, sec. 48-106. Section 14, ch. 198, Laws 1913, reads: "The following shall constitute employers subject to the provisions of this act:

"(1) The state and every governmental agency created by it." Comp. St. 1929, sec. 48-114.

Section 15, ch. 198, Laws 1913, reads in part:

"The terms 'employee' and 'workman' are used interchangeably and have the same meaning throughout this act; * * * and shall be construed to mean:

"(1) Every person in the service of the state or of any governmental agency created by it, under any appointment or contract of hire, express or implied, oral or written, but shall not include any official of the state, or of any governmental agency created by it, who shall have been elected or appointed for a regular term of office, or to complete the unexpired portion of any regular term." Comp. St. 1929, sec. 48-115.

Section 9, ch. 198, Laws 1913, provides in part: "If both employer and employee become subject to Part II of this article (Comp. St. 1929, secs. 48-109 to 48-115), both shall be bound by the schedule of compensation herein provided."

Section 48-172, Comp. St. Supp. 1937, reads: "All disputed claims for workmen's compensation shall be submitted to the Nebraska workmen's compensation court for a finding, award, order or judgment."

59 C. J. 303, is cited as follows: "It is usually said that statutes authorizing suit against the state are to be strictly construed, since they are in derogation of the state's sovereignty. Consequently, it is generally essential that the consent of the state to be sued be given expressly and by clear implication." See, also, *State v. Mortensen, supra.*

In the case of *O'Connor v. Slaker*, 22 Fed. (2d) 147, the court stated that Nebraska had, to some extent, waived its prerogative as to immunity from suit, discussing section 27-319, Comp. St. 1929, but that there was no statute in Nebraska expressly consenting, in its terms, that the state of Nebraska may be sued in the federal courts by a citizen of another state; that section 22, art. V of the Constitution, was not self-executing, and, to be effective, required action by the legislature. Therefore, if the state had not made the provision that citizens of another state might sue the state of Nebraska in federal courts, the state had not waived its immunity to suit.

"The legislative intent is the cardinal rule in the construction of statutes." *King of Trails Bridge Co. v. Plattsmouth Auto & Wagon Bridge Co.*, 114 Neb. 734, 209 N. W. 497; *City of Lincoln v. Nebraska Workmen's Compensation Court*, 133 Neb. 225, 274 N. W. 576.

"In construing a statute the legislative intent is to be gathered from the necessity or reason for its enactment, and its several provisions should be construed together, in the light of the general objects and purposes of the act, so as to give effect to the main intent. * * * *People v. City of Chicago*, 152 Ill. 546." *Kearney County v. Hapeman*, 102 Neb. 550, 167 N. W. 792.

In 59 C. J. 303, it is further said: "But a statute giving a court jurisdiction to hear and determine actions against the state is sufficient authority for the bringing of an action without any special statute expressly giving the consent of the state to be sued."

Appellee contends further that even though liability is created on the part of the state (see *Eidenmiller v. State*, 120 Neb. 430, 233 N. W. 447) there must be in each case a special or general statute waiving the immunity of the state, in addition to a statute creating liability, if none existed at common law. On this proposition appellee did cite cases wherein the state in each instance, by statutory provision, waived its immunity and consented to be sued. However, an act creating a liability against the state in favor of em-

ployees of the state, for injuries arising out of and in the course of their employment, is on an entirely different basis than the circumstances as occasioned in the cases cited by appellee. The language recited in the act, incorporating the state and every governmental agency thereof within the provisions of the act, is clear and unambiguous, and the legislative intent is adequately expressed to warrant this court in declaring the state intended to waive its sovereignty and give its consent to be sued in actions arising under the compensation law.

Other matters are raised in the special appearance and in the argument of appellee, which, in view of the foregoing, are not necessary to discuss.

For the reasons given in this opinion, the special appearance is sustained.

SPECIAL APPEARANCE SUSTAINED.

LIVE STOCK NATIONAL BANK, APPELLEE: FRANK SARGENT, ASSIGNEE, APPELLEE, V. TRUMAN A. JACKSON, APPELLANT: INTER-STATE LIVE STOCK COMMISSION COMPANY, GARNISHEE, APPELLANT.

288 N. W. 515

FILED NOVEMBER 17, 1939. No. 30769.

1. **Exemptions.** "Exemption from execution or attachment of wages of a judgment debtor is controlled by section 20-1559, Comp. St. 1929." *Lyons v. Austin*, 126 Neb. 248, 252 N. W. 908.
2. **Statutes.** "If an act is complete and independent in itself, it may amend or modify the provisions of existing statutes without controverting the provisions of the Constitution relating to amendments." *Scott v. Dohrse*, 130 Neb. 847, 266 N. W. 709.
3. ———. Section 20-1559, Comp. St. 1929, is a complete and independent act in itself.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

Samuel L. Winters, for appellants.

Reed, Ramacciotti, Robinson & Hruska and *Henry R. Marshall, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, MESSMORE and JOHNSEN, JJ., and KROGER and ELLIS, District Judges.

MESSMORE, J.

This is an appeal from a judgment of the district court for Douglas county, rendered in a garnishment proceeding in aid of execution. The case was tried, submitted and decided by the district court on a stipulated statement of facts, in substance as follows:

The Live Stock National Bank recovered a money judgment against the defendant, Truman A. Jackson, which was assigned to Frank Sargent, one of the appellees. Execution was duly issued on the judgment and returned unsatisfied for want of property to levy upon belonging to the defendant Jackson. Subsequent to the return of the execution, garnishee process was issued to the Inter-State Live Stock Commission Company, a copartnership, as garnishee, to appear and answer as to any indebtedness it might owe the defendant Jackson. Said garnishee process was issued upon an application of the plaintiff as required by law. May 8, 1939, the garnishee, Inter-State Live Stock Commission Company, appeared in open court and admitted that it was the employer of the defendant and indebted to him in the sum of $250, for the period covered by the garnishee process, as wages earned by him. Defendant Jackson appeared in said proceedings, filed an affidavit, received in evidence, in which he stated that he was a married man, the head of a family, having a wife and daughter living with and dependent upon him for support; that the wages sought to be garnished in this proceeding were wages earned after the first day of April, 1939, and that he had no other source of income except said wages; that said wages are necessary for the support of himself and family and are exempt, as provided in section 20-1574, Comp. St. 1929.

The district court entered an order as of date June 19, 1939, finding that the defendant is indebted to the plaintiff on the judgment entered herein; that execution against the

defendant had been returned unsatisfied for want of sufficient property on which to levy; that the garnishee, Inter-State Live Stock Commission Company, at the time of its answer, was indebted to defendant Jackson in the sum of $250. The court found as a matter of law that 90 per cent. of said $250 is exempt to the defendant, but that 10 per cent. of said sum is not so exempt and is subject to attachment and garnishment by the plaintiff. From this order defendant Jackson and Inter-State Live Stock Commission Company, garnishee, appeal.

The sole question tried in the lower court was as to whether 90 per cent. of the wages of defendant Jackson was exempt to him under the provisions of section 20-1559, Comp. St. 1929, or whether the whole amount of the wages was exempt to him under the provisions of section 20-1574, Comp. St. 1929.

Appellants' contention is that the act of 1907 (Laws 1907, ch. 160), which is the same as section 20-1559, Comp. St. 1929, is unconstitutional and void for the reason that it is amendatory of section 20-1574, Comp. St. 1929, without so stating in the section and without repealing section 20-1574; hence, there was a violation of section 14, art. III of the Nebraska Constitution, which provides: "No law shall be amended unless the new act contain the section or sections as amended, and the section or sections so amended shall be repealed."

Section 20-1574, Comp. St. 1929, is found under article 15, "Executions and Exemptions," "(c) Proceedings in Aid of Execution," and reads: "The judge may order any property of the judgment debtor, not exempt by law, in the hands of either himself or any other person or corporation, or due to the judgment debtor, to be applied towards the satisfaction of the judgment; but the earnings of the debtor for his personal services, at any time within three months next preceding the order, cannot be so applied, where it is made to appear, by the debtor's affidavit or otherwise, that such earnings are necessary for the use of a family supported wholly or partly by his labor." The foregoing sec-

tion of the statute has been in existence, without change, since 1858, and was a part of the Civil Code enacted in 1858. Complete Session Laws 1858, Part II, pp. 487, 520.

Section 20-1559, Comp. St. 1929, is found under the same chapter as said section 20-1574, with the exception that the former section is under "(b) Exemptions." Section 20-1559 was first enacted February 15, 1869 (Laws 1869, p. 170), and provided "That the wages of laborers, mechanics and clerks, in the hands of those by whom such laborers may be employed, both before and after such wages shall be due, shall be exempt from the operation of attachment, execution or garnishee process; Provided, That not more than sixty days' wages shall be exempt." This act was amended February 25, 1873, to read as follows: "The wages of laborers, mechanics, and clerks *who are heads of families* in the hands of those by whom such laborers, mechanics, or clerks may be employed, both before and after such wages shall be due, shall be exempt from the operation of attachment, execution, and garnishee process; Provided, That not more than sixty days' wages shall be exempt." Complete Session Laws 1873, p. 729. (Italics ours.)

The similarity between sections 20-1574 and 20-1559, Comp. St. 1929, is apparent, in that section 20-1574 contains the provision "but the earnings of the debtor for his personal services, at any time within three months next preceding the order, cannot be so applied," meaning to the indebtedness; while section 20-1559, before being amended, contained the provision: "Not more than sixty days' wages shall be exempt." In 1907 said section 20-1559 was amended (Laws 1907, ch. 160), and now provides as follows: "The wages of all persons who are heads of families, in the hands of those by whom such persons may be employed, both before and after such wages shall be due, shall be exempt from the operation of attachment, execution and garnishee process to the extent of ninety per cent. of the amount of such wages."

Section 20-1574, Comp. St. 1929, was a part of the Code of Civil Procedure enacted in 1858. The title to the act

was: "An Act to establish a Code of Civil Procedure," and under "Proceedings in Aid of Execution" provided as set out in section 20-1574. The Code did not state in precise terms the subject of exemption of wages; nor did any other enactment of the Code so state until 1869, when section 20-1559 was originally enacted, the title to the act reading: "To Exempt Laborers, Mechanics and Clerks wages in the hands of Employers, from Execution, Attachment and Garnishee Process." We deem it unnecessary to further follow this legislative history. The distinction between section 20-1574 and section 20-1559, in the manner of operation, follows:

Under section 20-1574, Comp. St. 1929, the judgment creditor proceeds directly against the debtor, citing him into court under oath for an examination of his assets. See, also, section 20-1565 *et seq.* to and including section 20-1582, Comp. St. 1929, all relating to proceedings in aid of execution. Also, under the provisions of section 20-1574 the debtor's wages, earned during the previous 90 days, is protected from attachment or execution. Section 20-1559, Comp. St. 1929, provides for exemptions allowed of the wages of heads of families, as classified in the chapter under "(b) Exemptions." If the judgment creditor proceeds directly against the wages earned for any given period by the judgment debtor, an exemption of 90 per cent. obtains. In section 20-1574, *supra,* in the first instance the remedy is by inquiry to ascertain whether a judgment debtor has any assets beyond his exemptions. Under section 20-1559 the remedy is against the *res,* consisting of wages in the hands of a third party, the defendant's employer, who becomes the garnishee and defendant. Under section 20-1559 the judgment creditor proceeds directly against the garnishee, employer, and, in the event of unsatisfactory disclosure, may prosecute his claim to a judgment against him. Under section 20-1574, in aid of execution against the debtor, if property is found which may be applied on the judgment, then by section 20-1575 and other sections of the statute, under "(c) Proceedings in Aid of

Execution," the court may appoint a receiver of the property; forbid a transfer or disposition of the property of the judgment debtor, not exempt by law; by section 20-1577 the judge or referee, acting under the provisions of this chapter, has power to continue the proceedings; and by section 20-1579, disobedience of any order of the judge or referee by the party may be punished as for contempt. So, the distinction between the remedial process of the two statutes here under discussion is more evident when we note the supplemental procedure involved, as above related.

The legislature, from the inception of this legislation, had in mind two types of remedial process for enforcing the collection of judgments. The cases cited under the propositions of law, as contended for by appellants, are cases in which the act is challenged and clearly and uncontrovertably changed or supplemented through laws, without expressly referring to and repealing them. We believe that section 20-1559, Comp. St. 1929, is not only not purely amendatory of section 20-1574, Comp. St. 1929, but it is a complete and independent act on the subject of exemption of wages, and is, as we have pointed out, entirely capable of construction apart from section 20-1574, and that both acts may stand.

It is stated that the district court in the instant case followed the reasoning in *Lyons v. Austin*, 126 Neb. 248, 252 N. W. 908. In that case the garnishee answered that it had money in its possession,—wages,—owing defendant. Defendant filed an inventory of his personal property, showing that its value did not exceed $25, except for wages, and claimed the total amount of wages exempt from judgment or garnishment, citing section 20-1553, Comp. St. 1929, which in part reads: "All heads of families who have neither lands, town lots or houses subject to exemptions as a homestead, under the laws of this state, shall have exempt from forced sale on execution the sum of five hundred dollars in personal property." This section further states that this provision shall not in any manner apply to the exemption of wages. Section 20-1559, as hereinbefore

stated, applies to the exemption of wages. The district court in the *Lyons* case found that the debtor was the head of a family; that his wages, with the exception of 10 per cent. thereof, were not subject to garnishment, following section 20-1559, *supra*. Section 20-1553, *supra*, had been amended April 5, 1913, to make it inapplicable to the exemption of wages. Laws 1913, ch. 52. Section 20-1574, Comp. St. 1929, was not amended or repealed by the laws of 1913. It may be gathered from the above decision that the legislature was content, and disclosed its intention, to treat the subject of exemption of wages as separate and distinct from proceedings in aid of execution, and apparently recognized the difference in the subject-matter from that contained in sections 20-1553, 20-1559, and 20-1574, Comp. St. 1929, even though the latter section was not involved in *Lyons v. Austin, supra*. We believe that the two sections of the statute in question may be reasonably construed together.

The modern rule is: "Where an act does not purport to be amendatory, but is enacted as original and independent legislation, and is complete in itself, it is not within the constitutional requirement as to amendments, though it may, by implication, modify or repeal prior acts or parts thereof." 1 Lewis' Sutherland, Statutory Construction (2d ed.) 446, sec. 239. See *Hinman v. Temple*, 133 Neb. 268, 274 N. W. 605; *Scott v. Dohrse*, 130 Neb. 847, 266 N. W. 709; *State v. Price*, 127 Neb. 132, 254 N. W. 889; *State v. Lehmkuhl*, 127 Neb. 812, 257 N. W. 229.

An examination of the act in question (Comp. St. 1929, sec. 20-1559) discloses that it is a complete and independent act. Such being the case, section 14, art. III of the Constitution, does not require that the statute, with which it purports to conflict, should be set out as amended and accompanied by a repeal of such statute.

As stated in 59 C. J. 871: "If an act or statute is in itself complete and intelligible without reference to other legislation, it is not within the prohibition of the constitutional provisions by reason of the fact that it amends other stat-

utes by implication, and it is not necessary that such statutes should be reenacted and set out at length as modified."

For the reasons given in this opinion, the judgment and decree of the trial court should be affirmed.

AFFIRMED.

DORA TRAVINSKY, ADMINISTRATRIX, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY ET AL., APPELLEES.

288 N. W. 512

FILED NOVEMBER 17, 1939. NO. 30667.

Negligence. When one, being in a place of safety, sees and is aware of the approach of a moving vehicle in close proximity to him, suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Affirmed.*

Anson H. Bigelow and *Phillip F. Abboud,* for appellant.

Kennedy, Holland, De Lacy & Svoboda, contra.

Heard before SIMMONS, C. J., EBERLY, PAINE, MESSMORE and JOHNSEN, JJ., and KROGER and ELLIS, District Judges.

ELLIS, District Judge.

This is an action for damages for alleged wrongful death.

Upon trial, at the close of plaintiff's evidence, the trial court sustained defendants' motion for a directed verdict and dismissed plaintiff's action. Motion for new trial was overruled and plaintiff brought this appeal.

The motion for directed verdict was predicated on the ground that plaintiff's evidence disclosed contributory negligence on the part of plaintiff's deceased more than slight, precluding plaintiff's recovery, and the disposition of the

case by the trial court was upon that ground. This ruling of the trial court is assigned as error, and while there are other assignments, only the one requires consideration.

The evidence, in so far as it is necessary to set it forth in this opinion, may be summarized as follows: The accident producing death occurred at the intersection of Fifteenth and Chicago streets, in the city of Omaha. Chicago street runs east and west and Fifteenth street runs north and south. There are double street car tracks on Fifteenth street. The accident occurred in October, 1936, around 6 o'clock p. m., it being sufficiently dark at the time so that the street light at the intersection was lighted and vehicles had their lights on. One of defendant tram company's cars was proceeding north on Fifteenth street on the northbound track which is the right-hand or east track of the two tracks on that street. In the opinion of a pedestrian, who observed the car as it passed the first alley south of Chicago street, the car was then traveling at a speed of 35 miles an hour. He did not observe the car from that point on until after he heard the impact. A taxicab driver, who followed the car for some distance and estimated that it was about 200 feet ahead of him when it entered the intersection in question, testified that the car was going faster than his car and fixed his car speed at from 30 to 32 miles an hour. There was evidence of the distance required in which to bring the car to a stop after the impact which, it may be conceded, has some tendency to corroborate these estimates of speed. The only eyewitness of this fatal accident and the movements of the deceased prior to the impact was the motorman of the car involved, the defendant Monaghan. He testified that he brought the car into the intersection at a speed of from 10 to 15 miles an hour and that at that time it was drifting, that is to say, there was no power on. As he reached a point approximately the center of the intersection he saw the deceased step off the curb at the northwest corner of the intersection. The evidence indicates that immediately prior to stepping into the street he was proceeding on the sidewalk. Other

evidence, including a plat of the intersection, indicates that the point where deceased stepped into the street was approximately 38 feet north and 30 feet west of the center of the intersection. The motorman further testified that immediately on stepping off the curb the deceased started to run and ran at an angle south and east from the point where he stepped into the street until he reached a point approximately in the center of the south-bound car track, and that at some point in this movement he raised his hand as though to signal the car to stop for him. Incidentally the regular stopping place for street cars at this intersection was on the southeast corner of the intersection. The distance between the rails of each set of tracks is 5 feet and the distance between the inside rails of the two sets of tracks is also 5 feet. When the deceased reached the point above indicated, he stopped and lowered his hand. The motorman testified that when the deceased stopped he was between 3 and 6 feet northwest from the front of the car, the measurement being a diagonal one and including, of course, the distance which he was west of the car as well as the distance he was north of the car. The motorman fixed the latter distance at a "couple of feet." Incidentally the evidence shows that the car projects about 1½ feet beyond the outside rail. When the deceased stopped and lowered his hand, the motorman put on some power and at that instant the deceased "made a sudden dash"—"darted across" in front of the car and was struck by it. The motorman did not see the actual impact of the car against the deceased, but felt it, and stated that it occurred "almost instantly" after the deceased started to move from the point where he had stopped and lowered his hand. The deceased was thrown to the northwest and he was found lying in the space between the two car tracks. No witness attempted to fix the exact point of impact, but blood marks on the pavement indicated that it was at least 10 feet, 10 inches, south of the south line of the sidewalk on the north side of Chicago street off of which the deceased stepped into the street.

As previously indicated, all of the foregoing evidence was presented by the plaintiff. The plaintiff is entitled to have this evidence considered in the light most favorable to her, and to the benefit of all favorable inferences arising from it.

The plaintiff contends that the deceased was a pedestrian crossing the street within the crosswalk space, therefore entitled to the right of way, and that the defendants were negligent in not according that right of way to him. In the most favorable light, the description of deceased's movement, as well as the evidence of physical facts, not only do not support this contention, but refute it, and the contention must be disposed of on that basis.

The evidence shows that deceased had availed himself of street car service on this street on previous occasions, and it is no more than a fair assumption to say that he knew the regular stop for taking on passengers was on the diagonally opposite corner of the intersection from that where he stepped into the street. If he intended to intercept the car, as would be indicated by his raised hand, he certainly should not have expected to do so at a point out in the intersection. His actual movement to the southeast indicates an intention to reach the regular stop, which intention was not realized, either because he had misjudged the distance of the car from him, the speed of its approach or some other reason. Be that as it may have been, the evidence discloses that he reached a point out in the intersection, stopped and lowered his hand. At this point he was safe from the car, and if he had remained stationary, the car would have passed him without injury. From the position of the motorman, the deceased's conduct and action clearly indicated he was conscious and aware of the movement of the car. When he stopped in such close proximity to the car, but nevertheless in a place of complete safety, there was nothing to indicate any danger in the car proceeding. The speed of the car up to that point was wholly immaterial, as the plaintiff was safe from it, and, regardless of its speed, it constituted no menace to him. The evi-

dence is that from this place of safety he suddenly moved into the path of the car and almost instantly was struck by it. There is nothing in the record to contradict this evidence.

We think that, as a matter of law, the last movement of the deceased constituted more than slight negligence contributing to cause the accident, and that the case is controlled by the decisions of this court in *Troup v. Porter*, 126 Neb. 93, 252 N. W. 611, and *McDonald v. Omaha & C. B. Street R. Co.*, 128 Neb. 17, 257 N. W. 489. In each of these cases the pedestrian suddenly stepped from a place of safety in close proximity to a moving vehicle directly into its path, and this court held that, as a matter of law, such act was negligence which was more than slight, justifying the trial courts in refusing to submit the cases to the jury. In passing, it is interesting to note that in the *Troup* case the only evidence of Judge Troup's movements came from the defendant driver of the car.

The plaintiff vigorously denies the application of the two cases cited, and contends that the case of *Doan v. Hoppe*, 133 Neb. 767, 277 N. W. 64, announces a rule for determining whether the question of contributory negligence is one of law for the court or one of fact for the jury, and that the rule therein announced required submission to the jury in the principal case. More than that, the plaintiff in effect argues that the rule in the *Doan* case has nullified and superseded the rule developed in the *Troup* and *McDonald* cases. We are unable to agree with either of these contentions. The plaintiff relies on this court's statement in the *Doan* case of the rule stated in *White v. Davis*, 103 Cal. App. 531, 284 Pac. 1086. Plaintiff contends that, under the rule of the California case, if the pedestrian looks, this one circumstance makes the question one for the jury. This would be a rule of thumb easy of application, but we are unable to agree that the problem is quite so simple or that the use of such a rule would be productive of desired ends. We must rather be reconciled to the probable impossibility of finding or making one rule which will be a safe guide in

all cases. It is no reproach of the California rule to say that it is not determinative in the principal case. It is noted that each division of that rule is wisely qualified by the statement that it is "usually" determinative.

The negligence does not arise from the single circumstance of whether the pedestrian looks or does not look. The determining element in this type of case is the sudden movement into the path of the vehicle followed by almost instantaneous collision.

In the instant case we think the fact that plaintiff's deceased looked and saw the car and was conscious of its motion and proximity made his act of suddenly stepping into its path negligence of a higher degree than if he had done so without looking, as Judge Troup apparently did.

The same reasoning applies to plaintiff's contention that the rule of the *Troup* and *McDonald* cases should not be applied here because of evidence of the excessive speed of the car. Conceding excessive speed to have been proved, it would seem that since the deceased observed the approach of the car he must have had some relative impression of its speed and that the higher that impression the greater his negligence in suddenly moving from a place of safety into its path.

The action of the trial court was right and the judgment is

AFFIRMED.

STATE, EX REL. WALTER R. JOHNSON, ATTORNEY GENERAL, ET AL., RELATORS, V. ALBERT C. TILLEY, STATE ENGINEER, RESPONDENT.
288 N. W. 521

FILED NOVEMBER 18, 1939. No. 30800.

States. Where an appropriation bill carries an appropriation in the following language, "not more than the sum of $9,200, to be expended under the direction of the attorney general and subject to the approval of the state engineer, for salaries and office maintenance in the office of the attorney general," said language

vests in the attorney general and the state engineer a discretionary power in the expenditure of the fund. There must be an affirmative determination by both of said officials before an expenditure can be made from the fund. The exercise of that discretion and the approval of the expenditure by the state engineer is indicated when he requires legal advice and service from the attorney general and that service is rendered.

Original application for a writ of mandamus. *Writ allowed.*

Walter R. Johnson, Attorney General, Clarence S. Beck, Don Kelley and *Rush C. Clarke,* for relators.

John S. Logan and *Robert H. Downing,* for respondent.

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

SIMMONS, C. J.

This is an original action of mandamus, which calls for the construction of certain language used by the legislature in the bill making appropriations for the state government for the current biennium.

The petition alleges that the relators are the attorney general and two of his assistants, and that the respondent is the state engineer; that, in said appropriation bill, the legislature provided a highway cash fund for the department of roads and irrigation, and that "not more than the sum of $9,200, to be expended *under the direction of* the attorney general and *subject to the approval* of the state engineer, for salaries and office maintenance in the office of the attorney general." Laws 1939, ch. 133, sec. 42. The petition further alleges that legal services were furnished to the department of roads and irrigation by the entire staff of lawyers, clerks, and stenographers in the attorney general's office, and that they performed all services during the month of July, 1939, required by said department; that each person on the staff of the attorney general's office is paid a regular salary; that the attorney general had directed the payment of the salary of the relator Beck in the

sum of $325 monthly and part of the salary of the relator Don Kelley in the sum of $8.33 monthly out of the funds so appropriated in consideration of services rendered by the attorney general and his staff for said department; that the relators presented to the respondent vouchers (on forms furnished by the respondent to the relators) for the month of July, 1939, for said salaries, upon which a direction of the attorney general was indicated, requesting the approval of the respondent; that the respondent refused to approve the same, giving as his reason that the office of the attorney general did not need the money, and that he would use it to build roads; that, when advised that he could not so use the funds, he informed the relators that he would let the appropriation lapse; that the respondent without good cause has refused to approve the vouchers. The petition further alleges that the office of the attorney general is maintained, as required by law, for the purpose of providing legal services to the various administrative branches of the state government, including the department of roads and irrigation. The petition further alleges that there is sufficient money in said fund to pay said vouchers. Petitioners pray for a peremptory writ of mandamus to compel the respondent to approve said vouchers, directing the payment of said salaries from said appropriation.

This court issued an alternative writ. Respondent in his answer admits the status of the parties, the passage of the appropriation act, the receipt and demand for approval of the vouchers; that he did not approve the vouchers, and that the attorney general's office provided legal services during the month of July for the department of roads and irrigation; and alleges that there was not submitted with said vouchers supporting information as to the time devoted to said services by the attorney general's office; that the relator Beck did not devote his full time to the department during that month, and that all of the services rendered by the attorney general's office to the department of roads and irrigation did not require the equivalent of the services of one full-time assistant to the attorney general;

that he has not approved, nor been asked to approve, the arbitrary arrangement or apportionment of salaries made by the attorney general; and that he has demanded that, if any part of said fund is to be expended with his approval, such expenditure be limited to payment for services actually rendered to his department.

The respondent sets out the history of the appropriation bill, the amount of the appropriation made directly for the salaries and maintenance of the attorney general's office, the further fact that several appropriations carried for various departments of the state government were similarly limited to the approval of the head of the department, and that the legislature did not intend that the appropriation involved in this action would be used for the general purposes of salaries and maintenance of the attorney general's office.

The respondent further alleges that the appropriation act vests in the respondent, and not in the relator, the authority and the discretion to determine whether, when, and to what extent, the $9,200 appropriation shall be used for salaries and maintenance of the attorney general's office; that unless demands of the department of roads and irrigation are so great that they cannot be met from direct appropriation to the attorney general's office, these funds should not be used. The respondent prays for a declaratory judgment fixing the rights, status, and legal relations of the parties under the act, and avers that he will cheerfully abide the judgment of the court.

The relators moved for the issuance of a peremptory writ on the ground that the answer does not state facts sufficient to justify the refusal to approve the vouchers, and that the answer does not constitute a defense.

The parties to this litigation do not occupy the position of ordinary litigants. They appear here in their official capacities. In their official capacities they are servants of a common master, to wit, the state of Nebraska. Their rights, duties, and responsibilities are fixed by the state Constitution and the acts of the legislature. The parties here are re-

sponsible to the people of this state for the performance of those duties.

The solution of the issue here presented, then, rests upon an interpretation of the law of the state of Nebraska and the intention of the legislature with reference to the expenditure of this fund. One of three propositions must be true: *First,* the discretion and the exercise of judgment as to the expenditure of the fund rests with the relator, and after the relator has reached a decision as to its expenditure, approval by the respondent is a ministerial act; or *second,* the relator and the respondent have a discretionary power in the expenditure of the fund, and there must be an affirmative determination by both before there can be an expenditure; or, *third,* the discretion and judgment with reference to the expenditure of the fund rests solely with the respondent, and the acts of the relator with reference thereto are ministerial.

In determining which of the three propositions is controlling, we consider the duties of the two parties, which the legislature must have contemplated, and the language of the act. Generally speaking, the relator is the legal adviser of the officials of the state and represents the state in litigation. To perform that function properly, it is necessary that his office be maintained, and that the employees of the office of the relator receive their compensation as provided by law and without delay.

So far as the duties covered by this appropriation are concerned, the general duty of the respondent is to build and maintain the highways of the state and to look to and receive from the relator legal advice as to any problems connected therewith. The respondent is responsible for the work of his department, and the decision of the question as to whether or not legal service is needed rests with him. Questions of personnel, methods of doing the work, and the correctness of the service given to the respondent by the relator are matters that rest with the relator, not with the respondent.

It must also be recognized that the purpose of the state,

in creating the offices held by the relator and the respondent, was to have the work of the state efficiently, promptly, and properly executed, and that it is the desire of the state to have its employees compensated for work done.

What was the intention of the legislature in making the appropriation subject to the expressed limitation? It is necessary that we define the terms used in the language under consideration, and, in doing so, give to that language the usual meaning. Each expression is to be construed in the light of the other; the expressions are to be reconciled and a meaning given to each if possible.

The word "direction" is defined by Webster as "that which is imposed by directing; a guiding or authoritative instruction; * * * order; command."

The words "subject to" are defined as "dependent upon; * * * limited by; * * * under the control, power, or dominion of." 60 C. J. 673.

The word "approval" is defined by Webster as meaning "approbation, sanction." It is defined in the authorities as follows:

"The word 'approved' naturally imports the exercise of judgment and discretion; and the power to approve ordinarily implies a power to disapprove.

"To 'approve' or give 'approval' is in its essential and most obvious meaning to confirm, ratify, sanction, or consent to some act or thing done by another. The word 'approve' does not, *ex vi termini,* necessarily import the exercise of discretion, but from the connection in which the term is used it often involves the idea of discretion and adjudication, and is seldom construed as requiring a mere ministerial act. 4 C. J. 1464." *Apfel v. Mellon,* 33 Fed. (2d) 805.

It is apparent that the second proposition stated above, to wit, the relator and the respondent have a discretionary power in the expenditure of the fund, and there must be an affirmative determination by both before there can be an expenditure, is controlling.

We cannot agree with the contention of the respondent

that this fund is not to be expended until all other funds appropriated to the attorney general's office have been exhausted, nor can we agree with his contention that the matter is left to the discretion of the respondent to determine when it is necessary that this fund be used to pay for legal services to the department of roads and irrigation. Examination of the appropriation bill reveals that in several instances the legislature provided for the payment of legal services out of appropriations for various agencies of the state. In this particular instance, the highway cash fund of the department of roads and irrigation is a fund not accumulated from the general revenues of the state. It is reasonable to hold that the legislature intended that the department of roads and irrigation should carry the cost of its legal services within the limits of the appropriation, and that the fund covered by this appropriation should be used for the payment of legal services rendered to said department whenever and to the extent required by that department. The attorney general's office is not an office run for profit. The amount of work involved in rendering the services and the proportionate charge that should be made therefor is a matter peculiarly within the knowledge and the discretion of the attorney general. In the absence of a showing that such charges are unreasonable or unconscionable, his decision as to the allocation of expenditures must be controlling.

We cannot agree with the contention of the respondent that this work should be figured on a piece-meal basis. The contrary legislative intent is clearly demonstrated by the provision that the appropriation shall be used for the payment of salaries and office maintenance. The payment of salaries means something in the nature of a regular pay for work performed rather than for the payment of services on a job basis. The adjustment of the cost of this service as fixed by the attorney general appears to be reasonable and a proper basis upon which to place the cost of that service.

Holding, as we do, that the respondent has a discretion

in the matter of approving the expenditure of this fund for legal services of his department, we come to the question as to how that approval may be indicated.

The respondent has no duty to perform in the matter except to determine the need for legal service and to request and receive the same. After the service is requested, the determination as to what shall be done, the research involved, and the mechanical work in rendering such service rests with the attorney general.

We conclude, therefore, that the approval of the respondent for the expenditure of funds from this appropriation is indicated when the services are requested and rendered. From the record here presented, it appears clear that services were rendered to the department of roads and irrigation by the relators during the month of July, 1939. The respondent has exercised the discretion which is vested in him by the act, and therefore has approved the expenditure in fact. There remains nothing for him to do but to perform the ministerial act of examining the voucher as to form and place his signature thereon. The peremptory writ is therefore granted.

WRIT ALLOWED.

JOHNSEN, J., dissenting.

I agree that the appropriation involved is available for payment of salaries and maintenance in the attorney general's office, to the extent of the time and cost to that office of any services rendered the department of roads and irrigation. The method of attempted withdrawal in this case, however, is to me improper. I am unable to accept the view that the appropriation is intended as a general fund that may be drawn upon whimsically, merely because some services have been rendered the department. It seems to me rather that the fund was intended to be used only in direct payment of time actually spent or cost actually incurred. Certainly it would be unnatural and misleading, for example, to allow the salaries of any of the members of the attorney general's staff to be paid out of the fund, whose time had not actually been spent upon the business of the

department. On the same principle, it appears to me equally improper to permit a salary withdrawal in this case in favor of an individual member of the staff in excess of the portion of his time actually spent for the department. Yet, notwithstanding that it is openly admitted that such is the situation here, and that the individual in whose favor a withdrawal is being made has not personally devoted time to the work of the department equivalent to the amount of the withdrawal, the majority opinion is indorsing this method of disbursing public funds. Such an indirect application might easily become a screen. It certainly is not sound business practice, and (unless it is a fallacy to assume that the state's affairs ought to be conducted on a business basis) there is no reason to approve it. If separate vouchers had been submitted for the portion of time spent by the several members of the attorney general's staff on matters in which the department of roads and irrigation had requested or required the services of the attorney general's office, and the state engineer had refused to approve them, I would agree that a writ of mandamus should issue.

MESSMORE, J., concurs in the dissent.

EDWARD J. THOMAS, APPELLANT, V. C. H. SHELDON COMPANY ET AL., APPELLEES.

288 N. W. 546

FILED NOVEMBER 24, 1939. No. 30686.

Record examined, and the judgment of the trial court is affirmed.

APPEAL from the district court for Platte county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

G. N. Anderson and *Dudley Thompson*, for appellant.

Charles H. Sheldon, contra.

Heard before SIMMONS, C. J., EBERLY, PAINE, MESSMORE and JOHNSEN, JJ., and KROGER and ELLIS, District Judges.

SIMMONS, C. J.

This is an action for damages tried to the court, a jury being waived. Judgment was for the defendants. Plaintiff appeals.

The first pleading, shown by the transcript, is plaintiff's "Third Amended Petition," filed October 4, 1937. Plaintiff for his first cause of action alleges that on or about August 17, 1931, the plaintiff and the defendants entered into a written agreement whereby the plaintiff "was to furnish pasturage for 250 head of cattle for the defendants until the first day of December, 1931, for the sum of $400." A copy of the alleged agreement was attached to the petition. Plaintiff alleged that the defendants placed 480 head of cattle in the pasture, that "the value of the pasturage for said 230 cattle was the sum of $368 from August 17, 1931, to the first day of December, 1931, at which latter date the said cattle were taken out of the pasture by the defendants;" that no part thereof has been paid; and prayed judgment therefor.

For his second cause of action plaintiff alleged that on the land rented to the defendants, at the time of renting, there were 18½ stacks of hay, each stack containing 5 tons, valued at $3 a ton; that defendants' "cattle did eat up 8 stacks of the value of $120," and from the remaining 10½ stacks "did eat and destroy * * * hay to the value of $100, being all of the value of $220 * * * at the time the cattle were taken out of the pasture on December 1, 1931," and plaintiff prayed judgment for said sum.

The transcript does not show service of summons or other process upon the defendants.

The next instrument shown in the transcript is defendants' amended answer filed April 2, 1938. It consists of a general denial, an admission of the execution of a lease by the parties, and allegations as follows: That the lease attached to the petition is not the lease which the parties executed; that the hay alleged to have been destroyed was old, decayed, contained weeds, and had no salable value; that the cattle of defendants were taken out of the plaintiff's

land on or before November 10, 1931; that the lease entered into by the parties terminated November 1, 1931; that the petition of the plaintiff was filed herein on November 27, 1936, and that, if any cause of action arose as alleged by the plaintiff, it is barred by the statute of limitations; that the defendants had settled with the plaintiff for said claims by the payment of $30 on July 27, 1932; that another action was pending on the same causes in Nance county. By reply, plaintiff alleged that the payment of $30 was for another matter not involved in this action. There are also allegations as to the legal description of the land not now material here.

The sufficiency of the pleadings to raise the issues presented does not appear to have been questioned in the court below, and they are not questioned in this court.

Plaintiff testified that the defendants put 480 head of cattle in the pasture for two and one-half months; that the consideration recited in the lease had been paid; that nothing was paid for the extra cattle; that he received $30 for mowing and raking certain hay; and testified rather indefinitely as to the amount and value of the hay taken and destroyed.

The copy of the lease attached to the petition recites: "The fences are to be put in order by the party of the first part (plaintiff). The number of cattle to be put into the above pastures shall be 250 head. All hay destroyed must be payed at the price at the time the cattle is taken out." The lease offered in evidence shows in typewriting: "The fences are to be put in order by the party of the first part. The number of cattle to be put into the above pastures shall be" (then follows an obvious erasure, and then written in pen is the following:) "250 head. All hay destroyed must be payed at price at the time the cattle was tokened out of pasture." Plaintiff on cross-examination testified that he made the erasure and changes and put in the part in ink "after I counted the cattle" in the pasture; that the change was made after the lease was signed and without the consent of the defendants; that the words erased were some-

thing like "shall be determined by the party of the second part (defendants);" that there was nothing in the lease about 250 head of cattle before the lease was changed; that he added the provision about payment for hay destroyed after the lease was signed and without the consent of the defendants; that he discussed the question of extra cattle in the pasture and the stacked hay with his attorney before he accepted the $30 settlement, but contended that the payment had nothing to do with hay in the stack.

The defendants' evidence clearly establishes that more than 250 head of cattle were in the pasture and that the number to be placed in the pasture was to be determined by the defendants; that the cattle were removed from the pasture not later than November 10, 1931; that there was some damage to hay, but that the hay was no good except for bedding; that these matters were all settled in September, 1932, by the payment of the $30 by check indorsed "In full settlement Ed Thomas a/c."

The trial court found generally for the defendants "upon the issues joined" (without specific findings of fact) and dismissed both causes of action at plaintiff's costs.

Plaintiff assigns as error that the findings and judgment of the court are not sustained by the evidence; that the judgment is contrary to law; and that certain evidence was improperly admitted.

This court has held: "Upon appeal, the admission of incompetent evidence at the trial below is immaterial in a case tried to the district court without a jury, if the judgment is supported by sufficient competent evidence." *In re Estate of Black,* 125 Neb. 75, 249 N. W. 84.

Disregarding the evidence to which plaintiff objects, the finding of the trial court may be sustained. No other judgment would have been proper under the pleadings, the evidence of the plaintiff, and the undisputed evidence of the defendants.

We have carefully examined the record and find no prejudicial error therein. The judgment of the trial court is

AFFIRMED.

JOHN SEARCEY, APPELLANT, V. VIRGIL BADGETT: M. M. BRIDGMON, GARNISHEE, APPELLEE.
288 N. W. 537

FILED NOVEMBER 24, 1939. No. 30698.

Garnishment. " 'In a garnishment proceeding in aid of execution, the answer and evidence of garnishee only are admissible in response to the summons in garnishment.' *Early v. Belgrade-Hord Co.*, 133 Neb. 884, 277 N. W. 596." *Orchard & Wilhelm Co. v. North*, 135 Neb. 39, 280 N. W. 272.

APPEAL from the district court for Johnson county: VIRGIL FALLOON, JUDGE. *Affirmed.*

Kenneth S. Wherry, for appellant.

Moore & Finn, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

EBERLY, J.

This is an appeal from an order of the district court dismissing and discharging the garnishee. The garnishee, by written answer, denied he was indebted to the judgment debtor in any amount. The judgment was regularly obtained in the justice court of Pawnee county, a transcript thereof filed in the office of the clerk of the district court for Pawnee county, and likewise in the district court for Johnson county. An execution was issued in Johnson county and returned unsatisfied for want of sufficient property whereon to levy and collect the same. Proceedings were then had on affidavit in garnishment, requiring the garnishee (appellee) to answer. He answered in writing, denying that he was indebted to the judgment debtor in any amount. By agreement, the matter was continued and set for hearing. Evidence was adduced in favor of the judgment creditor, seeking to trace property of the judgment debtor into the hands of the garnishee. The contention of the appellant is that the answer of the garnishee constituted a disclosure, and the garnishee proceeded to trial without objection. At the conclusion of the testimony in be-

half of the judgment creditor, the garnishee moved that he be discharged for the reason that the judgment creditor failed to interrogate him as provided in the summons issued in said cause, and the motion was sustained.

Appellant cites and relies upon the case of *Burlington & M. R. R. Co. v. Chicago Lumber Co.*, 18 Neb. 303, 25 N. W. 94, wherein this court held: "When a garnishee, prior to the time when it is required to answer as to its indebtedness, files an answer as in an ordinary action, and issue being joined thereon a trial is had and other witnesses are examined, without objection to the course pursued, such garnishee will not be permitted to question the regularity of the proceedings in the appellate court."

The above case is cited as being directly in point, and in that case there were filed an answer and a reply to the answer, and the case did proceed upon the theory of trial. In the instant case there is nothing in the record to show that the garnishee proceeded upon the theory of trial.

Section 20-1056, Comp. St. 1929, contains the procedure to be followed by a judgment creditor, in pursuing collection on the original judgment, wherein, after return of execution, an affidavit shall be filed by the judgment creditor in the office of the clerk of the court in which said execution was issued, stating that he has good reason to and does believe that any person, etc., has property of and is indebted to the judgment debtor; the clerk of the court shall issue a summons, as in other cases, requiring such person to appear in court and answer such interrogatories as shall be propounded to him, touching the goods, chattels, rights and credits of the judgment debtor in his possession. This would indicate clearly that, if interrogatories were not propounded and the garnishee previously, by written answer, denied indebtedness, he should be discharged.

Section 20-1030, Comp. St. 1929, in substance, provides that, if a garnishee appear and answer, and his disclosure is not satisfactory to the plaintiff (in this instance the judgment creditor), "plaintiff may proceed against him in an action by filing a petition in his own name, as in other

cases, and causing a summons to be issued upon it; and thereupon such proceedings may be had as in other actions, and judgment may be rendered in favor of the plaintiff for the amount of the property and credits of every kind of the defendant in the possession of the garnishee, and for what shall appear to be owing by him to the defendant, and for the costs of the proceedings against the garnishee." This provision of the statute is one of the remedies available to the appellant.

This court, in *Orchard & Wilhelm Co. v. North,* 125 Neb. 723, 251 N. W. 895, held: "Where discovery of property of a judgment debtor is sought through evidence from others than a garnishee, the remedy is provided in sections 20-1565 to 20-1582, Comp. St. 1929;" and specifically held: "In garnishment proceedings in aid of execution (Comp. St. 1929, secs. 20-1056 to 20-1061) the answer or evidence of the garnishee only may be taken by the court." In the body of the opinion, in speaking of procedure as found in sections 20-1056 to 20-1061, Comp. St. 1929, the same being the subdivision of the chapter of the Code relating to garnishment in aid of execution, it was said: "Nowhere in that procedure is any power granted the court to require answers from, or to take testimony of, any one other than the garnishee. Our legislature has never seen fit to provide, in respect of garnishments, that other evidence may be taken than that of the garnishee. * * * If the judgment creditor desires to get the facts in part from other witnesses he must proceed in other ways in aid of his execution." See, also, *Early v. Belgrade-Hord Co.,* 133 Neb. 884, 277 N. W. 596; *Orchard & Wilhelm Co. v. North,* 135 Neb. 39, 280 N. W. 272.

For the reasons given herein, the judgment of the district court is

AFFIRMED.

FEDERAL LAND BANK OF OMAHA, APPELLEE, V. ERNEST G. PRICE ET AL.: ELLA G. WOOD, APPELLANT.
288 N. W. 548

FILED NOVEMBER 24, 1939. No. 30705.

Mortgages. Cause being submitted on the transcript, no error being found, the ruling of the trial court, in refusing to set aside order of confirmation, is affirmed.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

D. R. Mounts and *C. Norman Gonderinger*, for appellant.

Franklin L. Pierce, Philip M. Wellman and *W. J. Hammond, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and FALLOON, District Judge.

PAINE, J.

This is an appeal in a mortgage foreclosure from an order denying a motion to set aside the confirmation of a sheriff's sale and to be given leave to present a second time objections to the sheriff's sale.

The Federal Land Bank of Omaha was granted a decree of foreclosure on April 25, 1936. On March 15, 1937, the sheriff of Holt county held a sale of said land and sold the same to the plaintiff for $3,063.90. The total costs amounted to $118.04, leaving $2,945.86 to be applied upon the note and mortgage, which left a deficiency of $140.50.

On March 3, 1938, the cause came on upon motion to confirm the sheriff's sale. The court, having examined all of the proceedings, confirmed the sale, subject to the following conditions: (a) That defendants shall have until February 1, 1939, to redeem from the decree; (b) that if redemption is not made before said date, sheriff's deed shall issue; (c) that the defendant Ella G. Wood shall be continued in the possession and occupancy of the real estate until March 1, 1939, and shall pay as rental $350 to the clerk of the court, which cash rental shall be applied as provided therein. It was further ordered that the defendant

should not plant any crop which shall mature after March 1, 1939, and shall protect all buildings and improvements, and shall not cut any of the trees or timber growing on said premises, or permit any waste upon said premises. It is further ordered that a writ of assistance shall issue after March 1, 1939, to place the purchaser in possession of the premises in case redemption is not made as provided.

On January 31, 1939, nearly eleven months after confirmation, the said defendant Ella G. Wood filed objections to the confirmation on the ground that the sale was not held as provided by law; that the bid was wholly insufficient, and that a subsequent sale will bring a substantially greater amount; that the fair and reasonable value is greatly in excess of the amount bid at the sale.

On February 4, 1939, said matter came on for hearing upon motion and objections to confirmation of the defendant Ella G. Wood. Said defendant requested leave to introduce evidence in support of her objections to the confirmation of sale, and the court denied such request.

The court finds that no redemption has been made as provided by the order of March 3, 1938, and that said sheriff's sale should be finally confirmed and the sheriff ordered to execute and deliver to the purchaser a deed to the premises, to which the defendant Ella G. Wood excepts.

All objections and motions of defendant being overruled, the sheriff's sale was approved and confirmed, and the sheriff was directed to execute deed to purchaser, to which order defendant Ella G. Wood excepts. Thereupon, the supersedeas bond was fixed in the sum of $500, to be conditioned that Ella G. Wood, defendant, prosecute her appeal without delay, and will not during the pendency of the appeal commit any waste upon said real estate, will pay all costs and all rents and damages which may accrue during the pendency of said appeal, and if said Ella G. Wood, defendant, shall execute a bond, then no writ of assistance shall issue. On February 16, 1939, Ella G. Wood and the Massachusetts Bonding and Insurance Company, as surety, furnished a bond in the sum of $500.

The defendant Ella G. Wood sets out as errors for a reversal hereof: (1) The court erred in entering an interlocutory order of confirmation on the 3d day of March, 1938; (2) the court erred in denying defendant's motion which was filed January 31, 1939, to set aside the order of March 3, 1938; (3) the court erred in refusing to fix a date for hearing on objections to the confirmation of the sale; (4) the court erred in refusing the defendant's request to be permitted to introduce evidence in support of the objections to the confirmation of sale.

The above and foregoing is a synopsis of the transcript as filed by the defendant in this court on April 22, 1939. Thereafter the Federal Land Bank of Omaha, plaintiff, moved the court to file an additional transcript for the reason that certain pleadings were not included in the transcript as filed by the defendant.

On June 13, 1939, a stipulation was signed by counsel for all parties that an additional transcript may be filed by the plaintiff in this court, which was duly done. This additional transcript is composed of objections to the confirmation of the sale, filed September 2, 1937, by Ella G. Wood, defendant, in which she objected to the confirmation of the sale for the following reasons: First, that said sale was not held and had in the manner and form provided by law; second, that the amount bid at said sale is wholly insufficient, and far below the present value of said real estate; and, third, that a subsequent sale will bring a substantially greater amount, and that the fair and reasonable value of said real estate is greatly in excess of the amount bid at said sale.

Said supplemental transcript also shows that on July 30, 1938, Ella G. Wood, defendant, filed a motion reciting that it was provided in the order of confirmation entered March 3, 1938, that she should pay $300 cash rent on or before August 1, 1938, and that she has been unable to pay the same, and that said premises consist mostly of grazing land, and that she has thereon cattle for pasture, but that the owners thereof will not pay her until the end of the

pasture season, to wit, October 1, 1938, and moves the court that the time of the cash payment of $300, now due according to the confirmation entered March 3, 1938, be extended, and that she have until October 1, 1938, to pay said sum of money, and thereafter, said motion coming on to be heard for an extension of time of payment, the district judge entered an order extending such time of payment until October 1, 1938, and required that she file assignment of such pasture rent for the season of 1938 with the clerk of the district court on or before August 20, 1938.

It thus appears that objections, as herein set out, were duly filed September 2, 1937, to the confirmation of said sale; that on March 3, 1938, the order of confirmation shows that, as the moratorium law has been set aside and held unconstitutional by the court, the order of a continuance thereunder, which was then in force, should be set aside, and the matter being submitted to the court on the objections to confirmation of said sale, and the court having examined all of the proceedings therein, and finding that the sale was held in conformity with law, and the land was sold for its fair value, the sheriff's sale was duly confirmed.

It clearly appears that, after the objections to the confirmation were examined and overruled, and confirmation entered, Ella G. Wood, defendant, took no steps to appeal therefrom, but some months later did file a request and motion for extension of time for the payment of the $300 rent, and an order of the court was made extending said time; that long thereafter Ella G. Wood, on January 31, 1939, filed practically the same objections to confirmation, and asked to have the confirmation set aside because she had had no hearing upon objections to the sale.

In *McKee v. Goodrich*, 84 Neb. 479, 121 N. W. 577, it is held that a plaintiff cannot accept and enforce so much of a judgment as is favorable to him, and recognize the judgment in so far as it is of benefit, and then appeal from the portion of the judgment that is against him.

In *Harte v. Castetter*, 38 Neb. 571, 57 N. W. 381, it is

provided that, if a party accepts the benefit of a decree in his favor, he waives the right to prosecute an appeal, for a party, by voluntarily accepting under a portion of the amount found due him, thereby fully and completely recognizing the validity of the decree, for if he had desired to prosecute his appeal he should not have accepted any portion of the decree.

Under the facts in this case, it appears to the court that the order of confirmation was entered leaving the defendant in possession of the premises for a certain length of time under certain conditions therein set out; that in entering such decree the court had simply overruled the objections to the confirmation, and it does not appear that the defendant had had evidence taken thereon, or had asked leave of court to introduce evidence upon the objections which had been filed on September 2, 1937, and then not only received the benefit of the order of confirmation, and the conditions therein set out, but upon motion secured extension of time for the payment of the rents to remain in possession of the land.

The court having found that the sale was held in conformity with law, the real estate sold for its fair value, and that all of the proceedings were regular and legal, and the defendant having taken no steps to appeal therefrom, it is now too late to ask leave to introduce evidence in support of objections filed long ago, or of the same objections refiled at a later date, and the action of the trial court is affirmed.

AFFIRMED.

JENNIE CALLEN, ADMINISTRATRIX, APPELLEE, V. STATE OF NEBRASKA ET AL., APPELLANTS.
288 N. W. 547

FILED NOVEMBER 24, 1939. No. 30704.

States. Special appearance of the state of Nebraska sustained in accordance with holding in *Anstine v. State, ante*, p. 148, 288 N. W. 525.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Reversed.*

Walter R. Johnson, Attorney General, and *Rush C. Clarke,* for appellants.

Paul W. White and *Palmer McGrew, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

CARTER, J.

This is a suit under the workmen's compensation law against the state of Nebraska and the department of public works to recover compensation for dependency resulting from the death of Walter Callen. The death of Walter Callen is alleged to have been caused by an accident arising out of and in the course of his employment as an operator of a road maintainer for the department of roads and irrigation of the state. The district court entered an award and the state appeals.

The attorney general complains of the overruling of the special appearance filed by him in the district court on behalf of the state. It appears from the record that service on the state was attempted by serving a summons on the governor, the head of the department of roads and irrigation and the attorney general, under the provisions of section 27-321, Comp. St. 1929. In a recent case we held that this section was not applicable and that the legislature had failed to provide the manner in which service of process may be had against the state, or a department of the state government, in a compensation case, as required by section 22, art. V of the Constitution. *Anstine v. State, ante,* p. 148, 288 N. W. 525.

It is also contended by appellee that the voluntary appearance filed by the attorney general and the subsequent general appearance that he made in the case are the equivalent of proper service. This was also decided contrary to the contentions of appellee in the *Anstine* case. There being no provision of statute for process against the state in a

compensation case, and the attorney general being without power to make an appearance binding upon the state, the trial court erred in not sustaining the special appearance filed by the attorney general on the state's behalf.

For the reasons stated, the special appearance is sustained and the judgment of the district court reversed.

REVERSED.

JUNE WREDE, APPELLANT, V. CITY OF DAVID CITY ET AL., APPELLEES.

288 N. W. 542

FILED NOVEMBER 24, 1939. NO. 30753.

1. **Contracts.** An express contract requires a meeting of minds of the contracting parties upon the terms and conditions of the contract and an intention to contract with reference thereto.
2. **Work and Labor.** An implied contract results where one performs a useful service for another, with his knowledge, and with the expectation of being paid therefor, and the other party by his conduct indicates that he knew, or according to the ordinary course of dealing and the common understanding of men should have known, that the services were to be paid for.
3. **Workmen's Compensation.** Evidence examined and *held* to sustain the judgment of the district court that the findings of fact on rehearing before the compensation court are not supported by the record.
4. ———. Under the provisions of section 48-174, Comp. St. Supp. 1937, amendment of 1935 (Laws 1935, ch. 57, sec. 13), it is not required that appellant from award of the Nebraska workmen's compensation court sitting *en banc* serve transcribed copy of testimony taken on opposing party or her counsel before filing same in district court.

APPEAL from the district court for Butler county: HARRY D. LANDIS, JUDGE. *Affirmed.*

Frank A. Dutton, for appellant.

William H. Carns, M. A. Shaw and *Hall, Cline & Williams, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, MESSMORE and JOHNSEN, JJ., and KROGER and ELLIS, District Judges.

KROGER, District Judge.

This is an action by June Wrede, hereafter referred to as plaintiff, against the city of David City, Nebraska, a municipal corporation, hereafter referred to as defendant, and the Employers' Liability Assurance Corporation, Limited, a corporation, to recover compensation for the death of her husband.

A hearing was had before a judge of the Nebraska workmen's compensation court and an award made. Plaintiff requested a rehearing before the full compensation court, and from an award on rehearing, defendants appealed to the district court for Butler county. From a judgment of the district court setting aside the award of the compensation court and dismissing plaintiff's petition, this appeal is prosecuted.

The record discloses that in November, 1937, the city of David City, in cooperation with the Works Progress Administration of the federal government, hereafter referred to as the W. P. A., was carrying on a project in said city consisting of spreading gravel on the streets of said city. The arrangement required the defendant to furnish the gravel and the trucks for transporting the same, the W. P. A. to furnish all labor for hauling and spreading the gravel on the streets. In addition, the W. P. A. furnished gas and oil for the trucks so employed. The defendant hired two trucks, one owned by Leo Brochtrup and the other by Dale Wrede, for an agreed compensation of two and one-quarter cents per ton mile. Neither truck was operated by the owner, but drivers were furnished by the W. P. A. from their list of certified workers, and Dean Wrede, a certified W. P. A. worker, and a brother of Dale Wrede, was assigned to drive the Wrede truck.

On the evening of November 18, 1937, Dean Wrede informed his brother Dale that it would be impossible for him to operate the truck the following day because of other

work he intended doing, and Dale thereupon informed him that "somebody had to drive it, he'd take it and drive it himself, it had to work—he wanted to be able to make some money, so he took it and went to work."

On the morning of November 19, 1937, Dale Wrede commenced hauling gravel with his truck and was observed so driving by the street commissioner of defendant city. He was also observed so driving by the foreman and timekeeper on the project, who was employed by the W. P. A. He continued driving until shortly after 2 p. m. of said day, at which time his truck collided with the other truck engaged on said project and Dale Wrede was instantly killed. He left surviving him his widow, June Wrede, the plaintiff herein, and three minor dependent children.

While a number of questions are discussed in the briefs and were argued orally, the disposition of this case depends entirely upon whether the record made on rehearing before the compensation court supported the finding of that court that the plaintiff's deceased husband was an employee of the defendant, city of David City, under an "expressed and implied contract of hire."

In support of her contention that there was an express contract of hire, the plaintiff relies upon a conversation she had over the telephone with the mayor of the defendant city on the evening of November 11, 1937. Her testimony as to that conversation is as follows: "He told me that they had changed pits; they were to haul gravel from a different pit. This pit was over by Bellwood, and that that also would be a higher rate, and for Dale to come to work, I should tell him, which I did. I told him I would tell him, and I told him that evening." The record further discloses that Dale Wrede did not go to work the next morning, which would be November 12, 1937, but that his brother Dean took the truck and hauled gravel with the same until the evening of November 18.

That the alleged conversation of the plaintiff with the mayor of the defendant city on the evening of November 11, 1937, was insufficient to constitute a contract of hire

can hardly be questioned. This is forcibly demonstrated by the conduct of the parties themselves. Dale Wrede did not so construe it. He did not take his truck and haul gravel with it the next morning, but on the contrary his truck was operated by a certified W. P. A. worker. The fact that this worker happened to be his brother did not alter the circumstances. Dale Wrede did not furnish the driver for the truck and the defendant city was not required, under the arrangement with the W. P. A., to furnish drivers for the truck. Dale Wrede's decision to drive the truck on November 19 was as a result of a conversation with his brother, not with an officer of the defendant city. The defendant knew nothing of the arrangement.

To support a claim that there was an express contract of hire, the evidence must show that there was an intention to contract and that there was a meeting of the minds between the parties as to the terms and conditions under which the employment was to be performed. *Vandenburg v. Center Township,* 124 Neb. 790, 248 N. W. 310. All of these elements are entirely lacking in the instant case, and the record is bare of any other evidence supporting the claim that there was an express contract of hire.

This leaves but one other alternative and that is that there was an implied contract of hire. The only evidence bearing on the question of an implied contract was contained in the testimony of Peter Buntgem and Walter Curtis. Peter Buntgem testified that he was the street commissioner of the defendant city, saw the deceased on the morning of November 19, 1937, operating his truck on the project, and that he did not object to Dale's driving the truck. His testimony was: "Q. And you, as street commissioner, permitted him to do that, did you? A. Well, I didn't have anything to say about it. Q. No one told you not to allow him to haul this gravel? A. I didn't have anything to do with that. That was up to the W. P. A. boss. Q. You didn't stop Dale Wrede from hauling gravel to the streets of David City? A. I didn't say anything to him—had no right to." Walter Curtis testified that he was fore-

man and timekeeper for the W. P. A. on the project in question on November 19, 1937, and he saw Dale Wrede driving his truck on said day after he had brought in the first load of gravel; that Dale Wrede was not a certified W. P. A. worker on this project. And he was asked this question: "Did you, as foreman of this Works Progress Administration project, permit Mr. Wrede to drive his truck in hauling this gravel on that day?" And his answer was: "I didn't have no authority to tell him to, or not to. It was his truck, and I figured—which he knew—he was not getting anything for it from W. P. A. or the city, so far as I knew."

This is the only evidence in the record bearing on the question of an implied contract of hire and, like the evidence of an express contract, it falls far short of establishing a situation where a contract of employment would be implied.

An implied contract may be said to result "where one performs for another, with the other's knowledge, a useful service of a character that is usually charged for, and the latter expresses no dissent or avails himself of the services, a promise to pay the reasonable value of the service is implied. * * * The service or other benefit must, however, not have been given as a gratuity, and the person benefited must have done something from which his promise to pay may be fairly inferred." 6 R. C. L. 587, sec. 6.

In this case the defendant city did nothing from which its promise to pay could be inferred. While the street commissioner did not object to Dale Wrede's driving his truck, it must be borne in mind that the city had not selected the drivers of the gravel trucks during any portion of the work; neither had it paid the wages of such drivers; neither did the city have anything to do with certifying W. P. A. workers. For all the city knew, Dale Wrede could have been a certified W. P. A. worker on November 19, 1937. Under those circumstances, it cannot be said that the city, failing to protest, accepted the services of Dale Wrede under circumstances which would imply a promise to pay for the same. The entire record discloses that Dale Wrede did

not operate his truck on November 19, 1937, with the expectation of being paid by the defendant city for his services, but that he operated the same so that he might be in position to receive the contract price for the use of the truck alone.

Plaintiff's last assignment of error has to do with procedure on appeal from the Nebraska workmen's compensation court sitting *en banc*. A motion was filed to dismiss the appeal for the reason that defendants and appellants had not filed a proper or sufficient transcribed copy of the testimony and evidence taken before the Nebraska workmen's compensation court because the purported transcribed copy had not been served upon the plaintiff and appellee or her attorney within the time provided by law. This motion was properly overruled for the reason that the transcribed copy of the testimony and evidence taken in the compensation court was certified by the stenographer who made the record and settled by the compensation court as provided by section 48-174, Comp. St. Supp. 1937, amendment of 1935 (Laws 1935, ch. 57, sec. 13), and said statute does not require service of such bill of exceptions upon the opposing party or her counsel before filing same in district court.

Finding no error in the record, the judgment appealed from is

AFFIRMED.

RALPH LONG, APPELLEE, V. E. MERLE GUILLIATT ET AL., APPELLANTS.
288 N. W. 689

FILED NOVEMBER 28, 1939. NO. 30689.

1. **Automobiles.** In an action under the last clear chance doctrine to recover damages for personal injuries alleged to have been negligently caused by defendants in a collision of motor vehicles on a public highway, plaintiff is not entitled to recover, if the jury may properly find from the evidence that he had the last

clear chance to avoid injury and negligently failed to do so, or if both drivers were contemporaneously and actively at fault.

2. **Appeal.** On appeal, an immaterial or harmless error in the proceedings below is not a ground for reversal.

APPEAL from the district court for Otoe county: WILMER W. WILSON, JUDGE. *Reversed.*

L. R. Doyle and *Jessen & Dierks,* for appellants.

Lloyd E. Peterson, McKenzie & Dugan and *Virgil L. Brown, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and FALLOON, District Judge.

ROSE, J.

This is an action against defendants to recover from them $10,232 for alleged negligence resulting in personal injuries to plaintiff. About noon December 14, 1937, a motor truck owned by E. Merle Guilliatt and driven by Walter Hoffman, defendants, collided with the automobile of plaintiff about a mile south of Nebraska City on paved highway 75 which runs north and south. Plaintiff had been traveling north. The truck was going south at the time of the impact. Plaintiff was injured. In his petition he alleged negligence of defendants as the proximate cause of his injuries, invoking the last clear chance doctrine.

Defendants in their answer denied the negligence attributed to them by plaintiff, and pleaded in detail that his injuries, if any, were caused by his own negligence and contributory negligence. The reply to the answer was a general denial. Plaintiff by formal preliminary motion in writing moved the court to strike from the answer the defenses of negligence and contributory negligence as inapplicable to the doctrine of the last clear chance upon which he relied for the recovery of damages. The motion was sustained after the evidence on both sides had been adduced.

The trial resulted in a verdict in favor of plaintiff for $1,950. From judgment thereon defendants appealed.

The principal assignment of error challenged as erroneous and prejudicial an instruction permitting the jury to return a verdict in favor of plaintiff for damages under the doctrine of the last clear chance, without regard to the rule that he was not entitled to such relief, if, in his peril, he had the time and the opportunity to avoid personal injury and neglected to do so.

Plaintiff testified to the following facts, in substance: He was an employee of the Otoe Food Products Company and, a few minutes before noon, December 14, 1937, started in his own Chevrolet car to the home of a fellow employee who resided about a mile south and half a mile east of Nebraska City; drove south a mile on highway 75; turned east from the highway and went a fourth of a mile; found the roads so slick that he turned around and started back to town; turned north at the highway; drove close to the east side of the pavement; front wheels went over the curb on the east side; got car back into the highway, where it slid to the west side; stopped with front wheels on the shoulder along the west curb and the rear wheels about two feet from the center line of the highway on the west side.

According to additional testimony of plaintiff, while trying to get his car off the west or wrong side of the highway, with the rear wheels spinning on the ice without any forward movement, he looked to the north and saw the truck coming over the hill. The evidence of an engineer is that the top of the hill was 650 feet from the place of the collision near a spillway; that the hill was 13½ feet higher than the spillway; that the pavement was nearly level immediately north of the spillway.

Hoffman, driver of the truck, testified that, going south, he first took notice of plaintiff's car when about 225 feet away; that plaintiff was following another car at the distance of about 45 feet; that the truck was within 40 feet of plaintiff's car when it commenced to skid; that it skidded in front of the truck; that Hoffman, on his own side of the highway, applied his brakes and skidded into plaintiff's car.

The evidence is in harmony on the icy and slippery condition of the pavement but is conflicting in most material respects.

Neither driver was in a good position to estimate the speed of the other's car. Plaintiff said he had been driving at a speed between 20 and 25 miles an hour and when he last started to skid he was going at the rate of 18 or 20 miles an hour. He estimated the speed of the truck at a rate between 40 and 45 miles an hour. The driver of the truck testified he came down the highway before applying his brakes at approximately 25 miles an hour and that plaintiff was traveling probably 30 or 35 miles an hour.

Plaintiff knew the condition of the pavement. He had passed the spillway going south a few minutes before the accident. He did not use chains on the wheels of his car. As the truck approached when he was in peril, he did not blow a horn or give any other signal. He said on the witness-stand that the truck was 400 feet away when the wheels of his car began to spin; that he discovered right after he stopped he could not get his car off the highway.

The petition and evidence show that plaintiff's car went out of control and stopped across the highway in defendant's line of travel; that plaintiff was sitting in his car at the time of the impact, and it is alleged he was unable to extricate himself. He testified: "I made an attempt to grab the door-handle to get out and the crash came." Whether he had the time, opportunity and means to avoid the peril in which he had negligently placed himself without any fault of defendants was a question for the jury in view of all the evidence and the physical facts disclosed by the entire record.

It would be exacting too much of the law to permit plaintiff to recover, if, in a perilous situation negligently created by himself, he had the last clear chance to escape and neglected to do so up to the very instant of the accident. The automobile does not do away with human desire to preserve life and to avoid bodily injury, nor eliminate legs of the driver in a stalled car on the wrong side of a slippery

highway as a means of locomotion. With the record as briefly outlined on the doctrine of the last clear chance invoked by plaintiff, the trial court gave an instruction containing the following direction to the jury:

"If you find and believe from the evidence that the said defendant Hoffman, servant of the said defendant Guilliatt, in charge of the said defendant Guilliatt's automobile, saw plaintiff was in a position of peril in time to avoid injuring him by the exercise of ordinary care by means reasonably within the control of the said Hoffman, and that said Hoffman failed to do so, then you are instructed that plaintiff would be entitled to recover and your verdict should be for the plaintiff and against said defendants."

This permitted the jury to return a verdict in favor of plaintiff though, if properly instructed, they might have found from the evidence that plaintiff himself had the last clear chance to avoid injury and negligently failed to do so, or that the drivers were contemporaneously and actively at fault. The instruction quoted was clearly erroneous and prejudicial to defendants. 11 C. J. 282; Annotations in 92 A. L. R. 47 *et seq.*, and 119 A. L. R. 1053 *et seq.*

Plaintiff by merely invoking the last clear chance doctrine as his sole cause of action did not thus necessarily eliminate the defenses of negligence and contributory negligence pleaded by defendants, if proved, but in the present instance the order striking those pleas from the answer do not appear to be prejudicially erroneous, since plaintiff pleaded and proved his own negligence and contributory negligence and defendants adduced their own evidence of the negligent acts of plaintiff to defeat a recovery on his only ground for relief.

For the giving of the erroneous instruction, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

O. J. HADLEY, APPELLEE, V. LIBBIE S. COREY ET AL., APPELLANTS.

288 N. W. 826

FILED NOVEMBER 28, 1939. No. 30620.

1. **Mortgages:** LIMITATION OF ACTIONS. The owner of the equity of redemption, who executed the real estate mortgage thereon, and who thereafter continued to retain the title thereto, had authority to bind the mortgaged property by her unrecorded extension agreement in writing extending the maturity date of the indebtedness secured thereby. As to such mortgagor, a cause of action did not accrue thereon, nor the statute of limitations commence to run, until after the termination of the stipulated extension period.
2. **Pleading.** "A demurrer to the petition is not, by the provisions of our code of practice, a proper part of the answer filed in a case, and should be disregarded." *Fidelity & Deposit Co. v. Parkinson*, 68 Neb. 319, 94 N. W. 120.
3. ———. "The sufficiency of a petition cannot be raised by incorporating a demurrer in the answer." *Peterson v. Wahlquist*, 125 Neb. 247, 249 N. W. 678.
4. **Limitation of Actions.** The defense of the statute of limitations, if not raised either by demurrer or answer, is waived.
5. **Lis Pendens.** "From the time of filing such notice (*lis pendens*) the pendency of such action shall be constructive notice to any purchaser or encumbrancer to be affected thereby, and every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed to be a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken in said action after the filing of such notice to the same extent as if he were made a party to the action." Comp. St. 1929, sec. 20-531.
6. ———. "The purpose of the rule as to *lis pendens* is to prevent third persons, during the pendency of the litigation, from acquiring interests in land which would preclude the court from granting the relief sought." *Merrill v. Wright*, 65 Neb. 794, 91 N. W. 697.
7. ———. If a purchaser or encumbrancer, subject to *lis pendens*, becomes a party to the action, he may be entitled to question the plaintiff's right to recover in the same manner as the original defendant, but is entitled to no greater rights of defense than possessed by the person to whose interests he succeeded.

APPEAL from the district court for McPherson county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

Hoagland, Carr & Hoagland, for appellants.

J. C. Hollman, contra.

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

EBERLY, J.

This is a suit in equity prosecuted in the district court for McPherson county by plaintiff, O. J. Hadley, against defendants Libbie S. Corey, unmarried, "John Doe and Mary Doe, real true names unknown," to secure the foreclosure of a certain real estate mortgage upon certain real estate situated in that county, which, at the time this mortgage was executed, was owned by Libbie S. Corey, named in this proceeding as mortgagor and defendant. It is pleaded in the petition that this mortgage bears date of May 1, 1922, and was given to secure the payment of a certain "real estate first mortgage coupon bond" of $1,200 bearing even date therewith, due and payable, with interest, five years after date; that the real estate mortgage was duly recorded on June 8, 1922, in book 5, at page 516 of the real estate mortgages of McPherson county; that on March 1, 1927, Libbie S. Corey, mortgagor, entered into an extension agreement in writing with the then owner of the above described note and mortgage, by the terms of which Libbie S. Corey covenanted (in part) that, "In consideration of the extension of the time for the payment thereof (the $1,200 coupon bond secured by the real estate mortgage aforesaid), the undersigned hereby * * * agrees with Clarence F. Kenyon, the present owner of the said note or bond and mortgage deed, or his heirs, administrators, executors, successors or assigns, to pay the principal sum due on said note or bond on the first day of May, 1932, and also the interest thereon at the rate of five per cent. per annum, payable semiannually, during the said term of extension, according to the tenor and effect of the ten extension coupons hereto attached; * * * And all conditions, covenants and agreements contained in said note or bond or mortgage

deed securing the same are hereby continued in force and ratified, except as to the time of payment, and except that the place of payment and rate of interest shall be as stated herein, and this agreement shall bear the same relation to the original note and mortgage and be construed therewith as though its terms had been originally a part thereof."

It also appears that this extension agreement, together with ten extension coupons attached, had been accepted and received by Clarence F. Kenyon, and that all such extension coupons had been duly paid excepting the tenth; that the default alleged consisted of the failure to pay the tenth coupon note in the sum of $30, and the sum of $1,200 due upon the principal note thus extended, together with interest on each instrument from May 1, 1932, as therein provided, together with the defaults by defendants in payment of taxes assessed on the mortgaged premises, which it was charged constituted a breach of the conditions of said mortgage extended, and entitled the plaintiff to a decree of foreclosure and sale as prayed. The petition also alleges that this extension agreement was filed for record in the office of the county recorder of McPherson county, Nebraska, on August 25, 1937, at 9 o'clock a. m., in book 7, at page 465 of the real estate mortgage records of said county, and that on the same day the original mortgage was rerecorded in book 7, at page 463 of the real estate mortgage records of said county. Mesne assignments in writing are properly pleaded, by the terms of which the plaintiff herein became vested with all the rights and interest originally granted by the terms of the original mortgage and all the rights created by the extension in writing hereinbefore referred to. True copies of the original mortgage and coupon bond secured by the same, the written extension thereof, and the several mesne assignments thereof, are all attached to and constitute a part of the petition filed in this case. In addition, it is alleged in this petition that the defendant Libbie S. Corey, by the terms of said real estate mortgage, as party of the first part, covenanted and agreed with the mortgagee, as party of the second part, to

pay all taxes assessed upon the mortgaged premises, including assessment for water rights, "and all taxes or assessments of any nature whatever levied upon this mortgage, or the debt secured by this mortgage, or against said party of the second part, or the owner of said bond, on account of this indebtedness, before the same becomes delinquent." By the terms of said mortgage it was further agreed by said Libbie S. Corey that the mortgagee therein named, as party of the second part, its successors or assigns, "may pay said taxes and assessments for water rights, redeem said premises from tax sale * * * on failure of the party of the first part to do so, and all moneys so advanced, with interest at the rate of ten per cent. per annum thereon, shall be repaid by said party of the first part and be secured by this indenture."

The petition also alleged "that said defendants have also failed and neglected to pay the taxes regularly and lawfully assessed against said mortgaged premises for the years 1931, 1932, 1933, 1934, 1935 and 1936, and have suffered the same to become delinquent and the county treasurer of said McPherson county, Nebraska, regularly and lawfully advertised said premises for sale for said taxes and sold the same according to law, and on the 4th day of November, 1937, plaintiff herein was forced to redeem said mortgaged premises from said tax sale for the above mentioned taxes and in order to do so was required to pay to said county treasurer of McPherson county, Nebraska, the sum of $183.15;" and in effect that there is due plaintiff upon the taxes thus paid, satisfied and discharged the sum of $183.15 with interest at 10 per cent. per annum from November 4, 1937, which is a lien on the mortgaged premises to be satisfied by the foreclosure and sale thereof.

It also appears that on December 18, 1937, at 4 o'clock p. m., there was filed in the office of the county clerk of McPherson county a *lis pendens* in due form, giving notice of the pendency of the above entitled action. It also is disclosed that an alias summons for John B. Newburn was issued by the clerk of the district court for McPherson

county to the sheriff of Logan county, Nebraska, in the present action on January 12, 1938, and by that officer served on such Newburn on January 15, 1938. So far as disclosed by the transcript, no amendment to plaintiff's petition was made in reference thereto.

To this petition the defendant Libbie S. Corey, on February 5, 1938, filed a general demurrer, as to which no ruling appears to have been made by the district court.

On July 14, 1938, the record discloses that, by stipulation of the parties, "the motion of the defendant Libbie S. Corey and the demurrer of the defendant John B. Newburn" were heard by the court and judgment entered finding the motion of Libbie S. Corey had been "satisfied," and the demurrer of John B. Newburn was "overruled," and defendants granted 30 days in which to answer. But neither the "motion" of defendant Corey nor the "demurrer" of John B. Newburn appear in the transcript. Thereafter on September 12, 1938, defendants Newburn and Corey filed their separate answers. To these answers separate replies were filed by the plaintiff.

On the issues thus joined, a trial of the merits of this cause was had in the district court for McPherson county. On the 13th day of October, 1938, the district court found and adjudged that, upon consideration of the pleadings and process, "due and legal service has been had upon all of the defendants and that all of said defendants have appeared and answered;" and "finds generally in favor of the plaintiff and against each and all of the defendants;" and thereupon entered a decree of foreclosure and sale as prayed for by plaintiff. Defendants Libbie S. Corey and John B. Newburn appeal.

The evidence in the record fully sustains the allegations of the petition, and clearly establishes that defendant Libbie S. Corey was the owner in fee simple of the mortgaged premises on the date this action was instituted and the *lis pendens* filed. Waiving consideration of all questions of pleading involved, the essentials of defendant Corey's defense are that plaintiff's action is barred by section 20-202,

Comp. St. 1929. The applicable provision of that statute is, viz.:

"At the expiration of ten years from the date the cause of action accrues on any mortgage as is herein provided, such mortgage shall be presumed to have been paid, and the mortgage and the record thereof shall cease to be notice of the mortgage as unpaid and the lien thereof shall then cease absolutely as to subsequent purchasers and encumbrancers for value; said period of ten years shall not be extended by nonresidence, legal disability, partial payment, or acknowledgment of debt."

This statutory provision is remedial in character.

In *Steeves v. Nispel,* 132 Neb. 597, 606-609, 273 N. W. 50, it is stated:

" 'In construing a remedial statute three things must be considered, viz.: The old law, the mischief, and the remedy.' *Clother v. Maher,* 15 Neb. 1, 16 N. W. 902. See, also, *Harmon v. City of Omaha,* 17 Neb. 548, 23 N. W. 503.

"But, 'In order to ascertain the proper meaning of a statute, later as well as earlier legislation upon the same subject may be referred to. All existing acts should be considered, and a subsequent statute may often aid in the interpretation of a prior one.' *Campbell v. Youngson,* 80 Neb. 322, 114 N. W. 415.

"So too, all statutes *in pari materia* must be taken together and construed as if they were one law, and, if possible, effect be given to every provision. *Hendrix v. Rieman,* 6 Neb. 516; *State v. Babcock,* 21 Neb. 599, 33 N. W. 247; *Dawson County v. Clark,* 58 Neb. 756, 79 N. W. 822; *Chicago, R. I. & P. R. Co. v. Zernecke,* 59 Neb. 689, 82 N. W. 26; *Logan County v. Carnahan,* 66 Neb. 685, 95 N. W. 812; *State v. Royse,* 71 Neb. 1, 98 N. W. 459; *State v. Omaha Elevator Co.,* 75 Neb. 637, 106 N. W. 979.

"Previous to April 1, 1925, the limitation prescribed for civil actions of this nature was: 'An action for the recovery of the title or possession of lands, tenements or hereditaments, or for the foreclosure of mortgages thereof, can only be brought within ten years after the cause of action

shall have accrued.' Comp. St. 1922, sec. 8507. In this connection, section 20-216, Comp. St. 1929, which has been retained unchanged since 1866, provides: 'In any cause founded on contract, when any part of the principal or interest shall have been voluntarily paid, or an acknowledgment of an existing liability, debt, or claim, or any promise to pay the same shall have been made in writing an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment, or promise.' These two sections were before this court in *Teegarden v. Burton*, 62 Neb. 639, 87 N. W. 337, and the following principles were there announced:

" 'In determining the period of limitation in an action to foreclose a real estate mortgage given for the security of a promissory note, section 6 of the Code of Civil Procedure (now section 20-202, Comp. St. 1929) should be construed in connection with section 22 of such Code (now section 20-216, Comp. St. 1929).'

"And, 'Where, after the maturity of a note secured by a real estate mortgage, interest payments are made annually on such note, a right of action accrues on the mortgage at any time within ten years after the date of the last payment on said note.'

"See, also, *Gillilan v. Fletcher*, 80 Neb. 237, 114 N. W. 161; *McLaughlin v. Senne*, 78 Neb. 631, 111 N. W. 377.

"In *McLaughlin v. Senne, supra*, the additional principle was also approved, viz.: 'Ordinarily the owner of the equity of redemption has authority to bind the property by such payment, and a payment by him on the mortgage debt before the statute has run is binding on the property, and tolls the statute as against a subsequent mortgagee with notice of the prior mortgage.' * * *

"But we are here concerned with a written extension agreement (made by the defendant), the terms of which constitute a promise to pay the indebtedness secured and evidenced by the note and mortgage in suit. The language of the 1925 amendment obviously does not include it, nor are the terms employed by this legislation repugnant to

that portion of section 20-216, Comp. St. 1929, which, in effect, provides: 'In any cause founded on contract, when * * * (as to) an existing liability, debt, or claim, * * * any promise to pay the same shall have been made in writing an action may be brought in such case within the period prescribed for the same, after such * * * promise.'"

But the language of section 20-202, Comp. St. 1929, hereinbefore quoted, construed as authorities heretofore cited require, is necessarily limited in its application to "subsequent purchasers and encumbrancers for value." The defendant Corey, during the entire period covered by the transaction down to the time of the commencement of the suit, has been continuously the owner in fee of the mortgaged premises, or, as sometimes stated, the owner of the equity of redemption. As such, she is not a "subsequent purchaser or encumbrancer for value." Therefore, not being within the protection of this statute, the district court properly denied her any relief based thereon. *Steeves v. Nispel,* 132 Neb. 597, 273 N. W. 50; *Bliss v. Redding,* 121 Neb. 69, 236 N. W. 181; *Tynon v. Bliss,* 121 Neb. 80, 236 N. W. 184; *Hatch v. Ely,* 131 Neb. 882, 270 N. W. 480; *Wasson v. Beekman,* 188 Ark. 895, 68 S. W. (2d) 93; *T. A. Hill State Bank of Weimar v. Schindler,* 33 S. W. (2d) (Tex. Civ. App.) 833; *Head v. Oldham Bank & Trust Co.,* 249 Ky. 292, 60 S. W. (2d) 621; *Hastings v. Wise,* 91 Mont. 430, 8 Pac. (2d) 636.

The substantial contentions made by defendant Newburn, as presented by the briefs in his behalf, are based upon section 20-202, Comp. St. 1929. He asserts that thereunder the mortgage and note secured by the same, set forth in the petition, "was outlawed May 1, 1932;" that, therefore, a five-year lease of the mortgaged premises executed by defendant Libbie S. Corey on July 14, 1937, to defendant Newburn, and the quitclaim deed conveying the mortgaged lands to Newburn, signed and acknowledged by Libbie S. Corey on January 14, 1938, were each senior and superior to any rights created by the alleged "outlawed note and mortgage" set forth in plaintiff's petition.

We do not overlook the contention that there is no evidence of valid mesne assignments from Clarence F. Kenyon to the plaintiff. The record wholly fails to sustain this contention. In addition, the original mortgage, notes, extension agreement, and assignments were produced by the plaintiff and received in evidence, all of which fully sustain his claim of ownership. Prior authorization of this sale and transfer by the executors or administrators by a court of competent jurisdiction is not essential to the validity thereof, upon collateral attack. *Edney v. Baum*, 70 Neb. 159, 97 N. W. 252; *Battey v. Battey*, 94 Neb. 729, 144 N. W. 786.

The defendant, relying on the statute of limitations (Comp. St. 1929, sec. 20-202) as the foundation or basis of his defense, was charged with the duty of properly pleading the same.

"The defense of the statute of limitations, if not raised either by demurrer or answer, is waived, and when sought to be raised by answer, in order to preserve the defense, the answer must be good against demurrer." *Scroggin v. National Lumber Co.*, 41 Neb. 195, 59 N. W. 548. See, also, *Taylor v. Courtnay*, 15 Neb. 190, 16 N. W. 842; *Atchison & N. R. Co. v. Miller*, 16 Neb. 661, 21 N. W. 451; *Barnes v. McMurtry*, 29 Neb. 178, 45 N. W. 285; *Alexander v. Meyers*, 33 Neb. 773, 51 N. W. 140; *Dufrene v. Anderson*, 67 Neb. 136, 93 N. W. 139; *Pinkham v. Pinkham*, 61 Neb. 336, 85 N. W. 285; *Central Bridge & Construction Co. v. Chicago & N. W. R. Co.*, 128 Neb. 779, 260 N. W. 172.

The answer of defendant Newburn contains no general denial of the allegations of plaintiff's petition, but is made up of four independent paragraphs. The first two paragraphs are each, in effect, a general demurrer to the petition as an entirety. Without consideration of their sufficiency as general demurrers, it may be said that they set forth no ultimate facts, but challenge the sufficiency of the facts alleged in the petition as an entirety to justify the granting of relief to plaintiff.

Section 20-811, Comp. St. 1929, sets forth the require-

ments of answers under the Civil Code of Nebraska. In the construction of this section we are committed to the rule, viz.:

"A demurrer to the petition is not, by the provisions of our code of practice, a proper part of the answer filed in a case, and should be disregarded." *Fidelity & Deposit Co. v. Parkinson,* 68 Neb. 319, 94 N. W. 120. See, also, *Damicus v. Kelly,* 120 Neb. 588, 234 N. W. 416; *City of Schuyler v. Verba,* 120 Neb. 729, 235 N. W. 341.

"The sufficiency of a petition cannot be raised by incorporating a demurrer in the answer." *Peterson v. Wahlquist,* 125 Neb. 247, 249 N. W. 678.

The third paragraph of this answer includes an attack on the validity of the mesne assignments by which the plaintiff became vested with the ownership of the instruments in suit. This matter we have already considered and determined adversely to the appellants.

In the fourth paragraph of this answer there is set forth that, after said note and mortgage were outlawed "and while this said defendant was in possession of said section 34 with a lease therefor, this said defendant entered into a five-year farm lease dated the 14th day of July, 1937, extending said lease from the 1st day of May, 1937, to the 1st day of May, 1942," duly executed and acknowledged by defendant Corey; that defendant also purchased said land from defendant Corey who conveyed the same to him by quitclaim deed dated the 14th day of January, 1938, which conveyed "all of said land and the title thereto to the said defendant John B. Newburn," and further alleges, in effect, that the rights and title created and vested in said Newburn "is superior to any claim or lien of the said plaintiff in this foreclosure suit." It is obvious, therefore, from a careful reading of the fourth paragraph of defendant's answer that the defense of the statute of limitations is not in any manner raised therein. Where an answer seeks to avoid the operation of the statute of limitations, it must set forth by distinct averments the facts relied upon. In the instant case, there was no compliance with this Code

requirement, neither does the bill of exceptions disclose any objection to the introduction of evidence on that ground or that the facts alleged were insufficient to constitute a cause of action. In the review of a case, the statute of limitations will not be regarded as a defense unless pleaded or otherwise relied on in the trial court.

It will be remembered that this suit was instituted and commenced on December 18, 1937, and on the same day a proper notice of *lis pendens* was duly filed, indexed, and recorded in the office of the county clerk of McPherson county wherein the premises in suit are situated. An alias summons, bearing date of January 12, 1938, was personally served on defendant Newburn in Logan county on January 15, 1938. Defendant Newburn is claiming title to the premises in suit by virtue of a quitclaim deed (exhibit N), signed and acknowledged by Libbie S. Corey before a notary public in Los Angeles county, California, on January 14, 1938. Thereafter this deed was transmitted to defendant Newburn at Stapleton, Logan county, Nebraska, by air mail, and recorded in McPherson county on February 5, 1938. Newburn does not testify as to when the deed was actually received by him. As to the consideration paid therefor, he testifies, viz.: "Q. What consideration did you pay for the land involved in the quitclaim deed, in 'exhibit N' from Libbie S. Corey? A. I paid $5 at the time I received the deed, and I was to pay $50 a year as long as the lease I had on the land ran, which I believe was three years more, if I remember right, and after that I was to pay her $50 a year as long as she lived. That wasn't in the lease, that was in letters I had in the correspondence which we had with them."

It may be said that the issuance and service of the alias summons in the instant case upon defendant Newburn was wholly unnecessary. Section 20-531, Comp. St. 1929 provides in part, viz.:

"From the time of filing such notice (*lis pendens*) the pendency of such action shall be constructive notice to any purchaser or encumbrancer to be affected thereby, and

every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed to be a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken in said action after the filing of such notice to the same extent as if he were made a party to the action." See *Johnson v. Olson,* 132 Neb. 778, 273 N. W. 201.

We are committed to the doctrine, viz.: "The purpose of the rule as to *lis pendens* is to prevent third persons, during the pendency of the litigation, from acquiring interests in land which would preclude the court from granting the relief sought." *Merrill v. Wright,* 65 Neb. 794, 91 N. W. 697. See, also, *First Nat. Bank v. Young,* 124 Neb. 598, 247 N. W. 586; *Lincoln Rapid Transit Co. v. Rundle,* 34 Neb. 559, 52 N. W. 563; *Gwynne v. Goldware,* 102 Neb. 260, 166 N. W. 625.

"The alienee of the property in litigation cannot establish himself by means of the statute of limitations." 17 R. C. L. 1032, sec. 29.

"In a legal sense the term (*lis pendens*) is equivalent to the maxim that pending the suit nothing should be changed (pendente lite nihil innovetur); and the doctrine of *lis pendens* is that one who acquires any interest in property during the pendency of litigation respecting such property from a party to the litigation takes subject to the decree of judgment in such litigation and is bound by it." 18 Standard Ency. of Procedure, 1087. See, also, 38 C. J. 49.

If an alienee, subject to *lis pendens,* becomes a party to the action, he may be entitled to question plaintiff's right to recover in the same manner as the original defendant. Such party, however, occupies the same position as the original defendant and is entitled to no greater rights of defense. 38 C. J. 64.

It follows that as to all claims of the defendant Newburn based upon or arising out of the quitclaim deed which was obtained, executed and delivered after the commencement of the suit against the defendant Corey and the filing of notice of *lis pendens* therein, the same are subordinated to

the proceeding and determined by the judgment entered herein against said defendant Corey.

For the reasons hereinbefore set forth, the judgment entered by the district court is correct, and it is

AFFIRMED.

AMANDA OLSON, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.
289 N. W. 356

FILED NOVEMBER 28, 1939. No. 30682.

1. **Appeal.** An instruction to the jury, closing with these words: "The burden then shifts to the defendant street railway company either to deny the unusual motion or jerk or to otherwise explain or excuse it," is prejudicially erroneous.
2. **Negligence.** The burden of proving defendant's negligence rests upon the plaintiff, and never shifts to the defendant at any stage of the case.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Reversed.*

Kennedy, Holland, De Lacy & Svoboda, for appellant.

Reed, Ramacciotti, Robinson & Hruska and *E. L. Marks, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, MESSMORE and JOHNSEN, JJ., and KROGER and ELLIS, District Judges.

PAINE, J.

This is an action for personal injuries sustained by the plaintiff in a fall in a street car, upon which she was a passenger. The jury returned a verdict of $4,000, upon which a judgment was entered. Motion for new trial being overruled, the defendant appealed, and asked for reversal upon the ground set out in twelve assignments of error.

The accident occurred at Fortieth and Cuming streets in the city of Omaha on January 6, 1938, about 6 o'clock in the evening. The street car was standing on Fortieth street, headed north, but about to turn west on Cuming street,

when plaintiff got on the car, and handed the motorman, who also acted as conductor, her transfer.

The plaintiff, who was 61 years of age, took hold of an iron stanchion, and started to go back in the car, the floor of which was about eight inches higher than the floor in the vestibule. Plaintiff anticipated the usual movement of the car in starting up to go around a sharp curve, but after it had gone a few feet there was a sudden and violent stop, which threw her backward, so that her head was down underneath the driver's seat. She broke both bones in her right arm and shattered the elbow joint. After being in a hospital a couple of weeks, she was subjected to an operation to remove pieces of broken bones. After this, she was kept in casts for six or seven weeks, and many adhesions formed around the joint, and there is no revolving motion in the forearm, and a 50 per cent. limitation in flexion and extension. The condition is permanent. She suffered a great amount of pain. She cannot do many things she could do before with this right arm. The hospital and medical bills amounted to $400. No very serious attack is made on the amount of the verdict.

To reverse this case, the defendant insists that prejudicial error occurred in the court giving instruction No. 3, requested by the plaintiff, and reading as follows: "You are instructed that where a street car passenger shows that he or she was injured by reason of a sudden and unusual movement, jerking, or lurch of the car, an inference of negligence arises against the street railway company. You are further instructed that it is not necessary for the plaintiff under these circumstances to show what caused the unusual motion or jerk; it is sufficient for the plaintiff to show that there was such an unusual movement, jerk, or lurch in the operation of the street car, and that this movement was the cause of the injuries complained of. *The burden then shifts to the defendant* street railway company either to deny the unusual motion or jerk or to otherwise explain or excuse it." Defendant insists that the vital defect is that it tells the jury in the last sentence that the burden

shifts to the defendant to deny the unusual motion or jerk, or to otherwise explain it or excuse it.

In the case of *Mercer v. Omaha & C. B. Street R. Co.*, 108 Neb. 532, 188 N. W. 296, paragraphs 5 and 6 of the syllabus read as follows:

"5. The burden of proof upon the issue of negligence does not shift during the progress of the trial, but rests throughout upon the party alleging such negligence; and a proper application of the doctrine *res ipsa loquitur* does not change said rule.

"6. 'The giving of an instruction which places the burden of proof to establish some of the facts put in issue by pleadings on the wrong party is reversible error.' *Omaha Street R. Co. v. Boesen*, 68 Neb. 437."

In *Lincoln Traction Co. v. Webb*, 73 Neb. 136, 102 N. W. 258, it states in the fourth paragraph of the syllabus: "But where negligence is proved * * * the carrier is then required to show that it was in no wise at fault, or that the plaintiff was guilty of some negligent act which contributed to the injury complained of." But, as a part of this opinion, the fourth paragraph of the syllabus in *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672, 74 N. W. 1074, is disapproved, which paragraph reads: "In an action for damages for an injury received while being transported by a common carrier, the injury being shown, the burden of proof is upon the carrier to show that it was in no wise at fault."

The plaintiff offered the objectionable instruction No. 3 on her own motion, and the court gave it in the exact form in which it was offered. To avoid a reversal because of the error in this instruction, the plaintiff calls our attention to the fact that the court in two other instructions referred to the matter of the burden of proof. We find that in instruction No. 2 the court did say this: "And if it is charged by reason of negligent operation of a car containing passengers that one of them has been injured, then the burden is upon the ones so charging to prove such fact of negligent operation that proximately resulted in such injuries, before

the jury can conclude that there was a negligent operation."

And again, in instruction No. 4, the court stated generally that, before the plaintiff would be entitled to recover a verdict, she must establish by a preponderance of the evidence certain definite acts of negligence, and concluded: "But should the plaintiff not so establish as she is herein required to do as a condition precedent to being entitled to recover, then you will find generally for the defendant." But nowhere do we find the usual instruction placing the burden of proof generally upon the plaintiff.

Taking all of the instructions as a whole, it does not appear to the court that the objectionable statement in instruction No. 3 is modified or corrected in any other instruction.

The rules of law which the court should give to the jury in its instructions in reference to negligence are simple, and should state to the jury that the burden of proving defendant's negligence rests upon the plaintiff, and that this burden of proof never shifts to the defendant, but rests at every stage of the case upon the plaintiff; and it is well to add this fact, that negligence is never presumed, but must be proved.

For the prejudicial error in instruction No. 3, the judgment is reversed and cause remanded for a new trial.

REVERSED.

SIMMONS, C. J., dissenting.

I agree with the finding of fact set out in the opinion of the majority, in that the evidence established, and the jury found, that plaintiff was a passenger of the defendant; that the street car had started in its normal course; that there was a sudden and violent stop that caused the plaintiff to fall, and that injury to the plaintiff resulted.

I do not agree with the conclusions of law set out in the majority opinion. The case is reversed because of the giving of instruction No. 3 requested by the plaintiff. An analysis of that instruction shows that the court told the jury that, where a street car passenger is injured as a result of a sudden movement or lurch of the car, an *inference*

of negligence arises against the street car company; that it is not necessary for the plaintiff to show *what caused the unusual jerk*; that it was sufficient for the plaintiff to show that there was an unusual movement or lurch of the car, and that such movement caused the injury complained of. *The majority opinion does not object to that part of the instruction.* My examination of the holdings of this court, to which reference will be made herein, indicates that it is a proper statement of the law. The objection is made to that part of the instruction which states that, after plaintiff has made the showing set out in the first part of the instruction, "the *burden then shifts* to the defendant * * * either to deny the unusual motion or jerk or to otherwise explain or excuse it." The instruction does not say that the burden of proof shifts, nor that the defendant has a general burden. The burden is limited to either denying, explaining, or excusing the unusual motion or jerk. The defendant is not by the instruction or otherwise required to carry that burden by a preponderance of the evidence. As I see it, the error of the majority opinion is in the assumption that the use of the words "burden shifts" is equivalent to the statement that the "burden of proof shifts." The cases relied upon by the majority are cases dealing with the *burden of proof*. There is a difference between the burden of proof and the burden of the evidence. Briefly, the difference is that the burden of proof, correctly speaking, means the necessity of establishing certain facts. "Burden of evidence" means the necessity which rests upon a party, at any particular time during the trial, either to create a *prima facie* case in his own favor or to overthrow one which is created against him. 22 C. J. 68; 20 Am. Jur. 134, sec. 131.

The burden of evidence is on the party against whom the decision of the tribunal would be given if no further evidence were introduced. At the beginning of the trial, the burden of proof and the burden of evidence are on the same party; the burden of the evidence so continues until the party with the burden of proof establishes a *prima*

facie case, and then the burden of evidence shifts to the party who has not the affirmative of the issue, although the position of the *burden of the proof is in no wise affected.* 22 C. J. 76; 20 Am. Jur. 134, sec. 132.

While the existence of a presumption of law does not affect the burden of proof, yet an inference of fact which the law assumes to be correct establishes, in the absence of evidence to the contrary, a *prima facie* case, and then the *burden of the evidence* shifts to the party to overcome that inference. 22 C. J. 79, 20 Am. Jur. 136, sec. 133.

Here, at the beginning of the trial, the burden of proof and the burden of evidence were upon the plaintiff to prove her case. That case is established when she proved that she was defendant's passenger; that there was the sudden, unusual and violent jerking of the car which caused her to fall, with the resulting injury. The instruction so states. An inference of negligence then arose which shifted the *burden of the evidence* to the defendant to overcome that inference of negligence, and the instruction properly advised the jury that, after the plaintiff had established these facts, that burden then shifted to the defendant either to deny the jerking of the car or to explain or excuse it. The reason for that rule is clearly stated in the decisions of this court to which I refer herein. It is based partly upon the liability of the defendant as a common carrier and also upon the proposition that the cause of the jerking or stopping is a matter peculiarly within the knowledge of the defendant, and it has the burden of explaining it. See 22 C. J. 81; 20 Am. Jur. 134, sec. 132.

In this particular instance, in all probability, the only person who knew what caused the jerking of the car was the defendant's motorman, and the instruction put the *burden of the evidence* upon the defendant to explain or excuse the jerking and stopping of the car. It did not shift the burden of proof. It put no other burden upon the defendant.

The majority opinion cites the case of *Mercer v. Omaha & C. B. Street R. Co.*, 108 Neb. 532, 188 N. W. 296, and

quotes from the syllabus in that case. Examination of that case reveals that this court there recognized the exact distinction which I have pointed out herein, that where a *prima facie* case of negligence is established, the defendant must produce evidence to rebut the presumption, but that the burden of proof as such remained on the plaintiff.

The *Mercer* case cites and discusses with approval *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890, 55 N. W. 270. In that case, the court pointed out that the instruction there under consideration told the jury that the fact that the plaintiff was injured by the derailing of a car did not raise a presumption of negligence against the transit company, and that it put a burden upon the plaintiff to prove *the cause of* the derailment of the car which produced the injury. The instruction was held to be erroneous. There the third paragraph of the syllabus is as follows:

"Where a street railway car is derailed and a passenger injured thereby, the presumption is that the casualty was due to the negligence of the carrier, and the *burden is on it* to rebut that presumption."

On page 900 the opinion states: "Here the jury were told in effect that the burden was on the plaintiff below to prove the cause of the derailment. This is not the rule. There is no claim by any one, nor is there a word of evidence, that Spellman was guilty of any negligence whatever. The transit company was a common carrier of passengers. Spellman was a passenger on its train. The car on which he was riding was derailed. He alleged he was injured thereby, and there was evidence to support the allegation. *He alleged that the derailment of the car was through the carrier's negligence. The law by presumption supplied that proof for him.* This was enough. *The burden was then on the carrier to rebut this presumption of negligence* by showing that it was produced by causes wholly beyond its control, and that it had not been guilty of the slightest negligence contributing thereto, and that by the exercise of the utmost human care, diligence, and foresight the casualty could not have been prevented."

That decision is clearly one sustaining the instruction given by the trial court. It has been repeatedly referred to with approval by this court down to and including the *Mercer* case, relied upon by the majority opinion.

Another case cited with approval in the *Mercer* case is that of *Lincoln Traction Co. v. Webb,* 73 Neb. 136, 102 N. W. 258, where the fourth paragraph of the syllabus is:

"But where negligence is proved, or where from the nature of the accident which was the proximate cause of the injury negligence is presumed, *the carrier is then required to show* that it was in no wise at fault, or that the plaintiff was guilty of some negligent act which contributed to the injury complained of."

This court there recognized the rule that the burden of proof never shifts. In that case, it was held that the plaintiff had to prove that her fall was the result of a sudden starting of the car when she was trying to alight. The court held that the basis of the presumption in actions against carriers for personal injuries was not the mere fact of the injury, but the act of the defendant which caused the injury, and when that act was shown, that the plaintiff had established a *prima facie* case. The court then referred to the *Spellman* case and said on page 140: "The *burden was then on the carrier to rebut this proof of negligence* by showing that it was produced by causes wholly beyond its control." Further, on page 141, quoting from *Omaha Street R. Co. v. Boesen,* 68 Neb. 437, 94 N. W. 619: *"It will then devolve upon the company* to show that the injury occurred without any negligence on its part, and that by the exercise of the highest degree of care it could not have prevented such injury." Again, on page 143, the "presumption arises from the inherent nature and character of the act."

The majority opinion cites the *Webb* case, apparently with approval, but says that a statement in the fourth paragraph of the syllabus in *Lincoln Street R. Co. v. McClellan,* 54 Neb. 672, 74 N. W. 1074, was disapproved. The body of the opinion shows that the rule there criticized was *modified* so as to conform to the rule announced in the *Webb*

case. Instructions No. 2 and No. 3 given by the court and set out herein definitely meet the rule as so modified.

In the concurring opinion in the *Webb* case (73 Neb. 136, 145) Chief Justice Holcomb further developed this same principle, and stated that in the case at bar the injury was alleged to have been caused by the street car's starting while the passenger was alighting, and that by reason thereof she was thrown to the pavement and sustained the injuries; when that fact was established, then a presumption of negligence arose, and that it *"would devolve upon the carrier* to show that it exercised that degree of skill, diligence and foresight for the safety of its passengers which the law charges it with." Further, on page 147, he states: "When the physical act has been shown or is apparent, *and is not explained* by the defendant, the conclusion that negligence superinduced it may be drawn as a legitimate deduction of fact." Citing a Colorado case, *Denver & R. G. R. Co. v. Fotheringham,* 17 Colo. App. 410, 68 Pac. 978, he said: "When such proof is made, the burden is transferred to the carrier to show its own freedom from fault." He stated further: "The true rule seems to be that, where a passenger sustains an injury growing out of the acts of the carrier's servants or employees, or because of any defect in machinery, coaches or roadway, or any of the means, appliances or agencies connected with or employed in the transportation of the passenger, the presumption arises that the injury was caused by the negligence of the carrier, and it *then devolves upon it to explain* the act and relieve itself of the imputation of negligence thus cast upon it, the negligence complained of being the proximate cause of the injury inflicted."

In the case of *Lincoln Traction Co. v. Shepherd,* 74 Neb. 369, 374, 104 N. W. 882, 107 N. W. 764, on rehearing Judge Sedgwick states that, when a passenger is injured through some "defect in the appliances of the carrier, or some act that is done by its employees in the conduct of the business, a *presumption of negligence* on the part of the carrier arises, and this presumption is sufficient, in the absence of

any other evidence upon the subject, to supply the proof demanded of the plaintiff upon that point and establish *prima facie* the negligence of the carrier. *If unexplained by the carrier,* no further proof upon that point is necessary to establish his negligence. But if evidence appears in the plaintiff's own testimony, or is offered by the defendant, sufficient to rebut this presumption, then the negligence of the carrier is not established by the presumption." Further, on page 377: "The sudden starting of the car, in the manner and under the circumstances alleged, while the plaintiff was properly on the steps and in the act of stepping to the ground, being the act of the carrier, would, if the cause of the accident, furnish a *presumption of negligence* on the part of the carrier."

All these cases are cited with approval by this court in *Mercer v. Omaha & C. B. Street R. Co., supra,* upon which the majority relies as authority for reversing this case. All of them clearly establish that all that the plaintiff is required to do is to prove that she is a passenger; that she was injured by a sudden and unusual jerking of the defendant's car; that when those things are proved, a presumption of negligence arises which must be overcome by proof; that if the plaintiff's proof does not overcome that presumption, then *the burden of evidence* is upon the defendant to establish that fact. It is not a case of shifting the burden of proof. It is a shifting of the burden of the evidence to overcome a presumption.

The case of *City of McCook v. McAdams,* 76 Neb. 1, 7, 11, 106 N. W. 988, 110 N. W. 1005, 114 N. W. 596, presents a somewhat similar situation. In that case the city of McCook was sued for damages alleged to have been occasioned by the failure of the city to keep in repair an artificial drainage system constructed by it, whereby surface water was diverted during a rainstorm and cast upon the plaintiff's premises. The city pleaded a general denial, and that the storm was of such unprecedented character as to constitute an act of God. Three opinions were written on the matter. The defendant complained of an instruction on

the ground that it stated that on certain questions the burden of proof shifted to the defendant. The court points out on page 6 of the official report that the court first instructed the jury that the burden of proof was on the plaintiff to establish the material allegations of his petition. That was followed by the portion of the paragraph of which the complaint was made by the defendant, which was: "This burden, however, does not remain with the plaintiff upon a question of affirmative defense, and the point at which the *burden shifts* to the defendant will be later pointed out in these instructions." The court there in the opinion by Commissioner Albert stated: "It is clear that the court did not instruct, and the jury could not have understood, that the burden of proof as to any issue tendered by the petition shifted, but merely that the burden of proof rested upon the defendant to establish its affirmative defense."

The case is again reported in an opinion by Commissioner Albert on page 7, and in an opinion by Judge Letton on page 11. It was there held that an instruction was not erroneous which told the jury that, if they found that the defendant was guilty of negligence in failing to keep the drainage system in repair, the burden of proof was then upon the defendant to establish by a preponderance of the evidence that the storm was of sufficient violence to have caused the damage sustained by the plaintiff without the concurrence of such negligence.

While the burden there was put upon the defendant to establish its affirmative defense, statements of the court in the final determination of the case are illuminating upon the issue here presented. We quote from the opinion of the court:

"While the burden is on the plaintiff to show that his loss is the result of the defendant's negligence, when he has established the fact of negligence on the part of the defendant and that his loss occurred directly therefrom, he has met all of the conditions the law imposes upon him in order to recover, before any evidence is produced by the de-

fendant. * * * When the plaintiff has closed his case, the defendant may show that it was not guilty of the negligent act complained of by either direct or indirect proof which negatives the proof offered by the plaintiff as to the fact of its negligence or the plaintiff's damage. * * * While not confessing the cause of action, they seek to avoid its effect by proof of other and new matter which bars the plaintiff's right to recover, and they must be established by the defendant in order to overcome the evidence on the part of the plaintiff, which, *unexplained,* would establish the defendant's negligence. * * *

"In the former opinion a distinction is sought to be drawn between such defense if pleaded by a common carrier and if offered by another, but we see no reason for the distinction, provided that the person seeking to assert it stands in a similar relation to the person injured. A carrier has undertaken a special duty to carry safely. If he fails to do so *a presumption arises against him, which he must explain away.* In this case the city had constructed a drainage system which the jury found it had neglected to keep in repair, and that by its negligence the plaintiff apparently was injured. In the one case, the presumption took the place of evidence against the carrier; in the other, the jury found the facts against the city as to neglect to keep up the ditches. *The burden then rests alike on the carrier and the city to produce proof* to show that its negligence was not the proximate cause of the loss or injury, but that the loss was attributable to an independent cause without the concurrence of its negligence, or, in other words, that, even if it had not been negligent, the injury would have occurred. * * *

"This view does not conflict with the doctrines of the cases of *Omaha Street R. Co. v. Boesen,* 74 Neb. 764, or *Lincoln Traction Co. v. Shepherd,* 74 Neb. 369, 374, for the burden of proof as to the existence of negligence still rests upon the plaintiff throughout the trial; * * * The burden was placed upon the plaintiff by the instruction to prove the defendant's negligence of duty and his damage. After

he had made his case, in order to escape the logical result of this proof, the defendant was required to show that the loss was inevitable under the circumstances. We think this was proper. *After its negligence was established it had the laboring oar.* The burden did not rest upon it to disprove negligence, but upon the plaintiff to prove it, but, negligence being proved against it, it *did have the burden* of showing an independent cause for the injury, by reason of which it was released from liability."

In my opinion, the above authorities clearly establish that the jury were properly instructed as to the law of the case and as to the burden of the evidence which rested upon the two parties.

The majority opinion, after holding that the instruction is erroneous, states that the objectionable feature has not been corrected in any other instruction. The majority opinion quotes a part of instructions No. 2 and No. 4, which were given by the court on its own motion.

Instruction No. 2 in full is as follows:

"Street car companies by their servants are required to operate their cars for the benefit of their passengers with the highest degree of care and skill reasonably possible, and of which that operation is susceptible, and are liable for the slightest negligence that proximately brings about in such operation injuries to passengers. However, *they are not liable* for injuries to passengers for any such movements of their cars, which movements of such cars containing passengers are fairly and reasonably necessary in the operation of cars. Because passengers are injured by falling in cars, is not of itself proof of any negligence in the operation of the cars. And if it is charged by reason of negligent operation of a car containing passengers that one of them has been injured, then *the burden* is upon the ones so charging to prove such fact of negligent operation that proximately resulted in such injuries, before the jury can conclude that there was a negligent operation. It is the duty of those operating cars to start and stop the same without unnecessarily jerking or lurching the same, and should the

passengers while progressing towards a seat be caused to fall or become injured because of a sudden or violent jerking of the car, or violent lurching or violent stopping, which movements were so violent or unusual that it was unnecessary in the car's operation, and proximately resulted in a passenger's personal injury, who was taking due care of herself or himself at the time, then the ones so operating such car would be responsible for such injuries that such passenger might receive as the proximate result of such unusual violent and unnecessary movement of the car."

Instruction No. 3 given by the court on its own motion is:

"It is the *duty* of passengers on street cars on entering and progressing towards a seat to take reasonable care of themselves not to fall by reason of motions of the car that are necessarily made in the operation of the street cars. And should a passenger be injured, even by the motions of the car that are made reasonable and necessary in the operation of such cars on the streets, then there is no responsibility by the street car company in damages to the one injured, no matter how severe the injury may be, as a passenger *assumes* all the risks that are ordinary and usual in the way of jerking or lurching in the ordinary and necessary operation of the car. *The plaintiff must go further* and show that the jerking and lurching movement of the car of which she complains was of an unusual and forcible nature, and so forcible that a reasonable passenger knowing that he must take reasonable care of himself against ordinary movements of cars would not have reasonably anticipated."

Instruction No. 4 given by the court on its own motion is as follows:

"Before the plaintiff will be entitled to a verdict at your hands *she must establish by a preponderance of the evidence* that while she was progressing towards a seat as a passenger, and after the car had been started, that it was suddenly stopped with such unusual violence that she could not have reasonably anticipated, and that was unnecessary

in a reasonable and necessary operation of the car by the car operator. And should she so establish as herein required as a condition precedent to being entitled to a verdict at your hands, then you will return a verdict in some amount for the plaintiff, also including plaintiff's expense for doctors and hospital bills, and with reference thereto you will be guided by another instruction to which your attention will be later directed herein. But *should the plaintiff not so establish* as she is herein required to do as a condition precedent to being entitled to recover, then you will find generally for the defendant. You will not allow the question of sympathy for the plaintiff to have any relation to your conclusion."

Instruction No. 8 is as follows:

"By a preponderance of the evidence is meant not necessarily the greater number of witnesses, testifying on one side or the other, nor to any given fact or set of facts, but by this term is meant rather the weight of evidence, that which on the whole, when fully, fairly and impartially considered by the jury, produces the stronger impression upon the minds of the jury, and is more convincing as to its truth, when weighed against the evidence in opposition thereto."

It is true, as the majority opinion points out, that the court did not give the usual instruction on the burden of proof. It is also true that the defendant did not ask for such an instruction. It is likewise true that the defendant does not assign as an error the failure of the trial court to give such an instruction. It is also true that this court has held: "It is not necessary to use the words 'burden of proof' in instructing a jury. Other words may as well and aptly convey the idea." *Neeley v. Trautwein*, 79 Neb. 751, 113 N. W. 141.

This court in the above case clearly held that the instructions were sufficient if they told the jury where the *onus probandi* lay. I submit that in this case the instructions given by the court to the jury, while they did not use the words "burden of proof," did state to the jury (not once,

but several times) the facts which the plaintiff must prove by a preponderance of the evidence. They defined that "preponderance of the evidence," and also stated at what point in the trial of the case an inference of negligence arose, and when the burden shifted to the defendant to overcome that inference of negligence. I can find nothing in the instructions that would indicate that the jury could possibly have been misled by these instructions. This is particularly true when it is pointed out that the majority opinion does not question the first part of the instruction, nor does the defendant here claim that the first part of the instruction was erroneous. The fact that the court did not elsewhere use the term "burden of proof" is further evidence that the jury could not possibly have been misled by the use of the word "burden" in the instruction about which complaint is made.

I regret the length of this dissent, but it is made necessary by my conviction that the majority opinion is wrong in reversing this case for the reasons given, and, likewise, because of the effect of this decision upon litigation and the rights and liabilities of parties hereafter.

JOHNSEN, J., concurs in the dissent.

STATE, EX REL. RICHARD C. HUNTER, ATTORNEY GENERAL, APPELLANT, V. HOME SAVINGS & LOAN ASSOCIATION ET AL., APPELLEES.

288 N. W. 691

FILED NOVEMBER 28, 1939. No. 30542.

1. **States.** An act of the legislature which provided that certain land belonging to the state "is hereby dedicated to the use" of a particular church, "provided, however, that said church shall within one year from the passage of this act use and occupy such lot for church purposes; and provided, further, that if at any time such church shall abandon the use of said lot for the period of one year the title to said lot shall revert to this state," constituted, on acceptance thereof by use and occupancy of the lot for church purposes within a year, a grant of an

estate in fee simple defeasible, with a limitation upon its use.
2. Injunction. The state through its attorney general was entitled to enjoin any threatened diversion, on the part of either the original grantee or a third party, of the use for which such property was granted.

APPEAL from the district court for Lancaster county: JOHN L. POLK, JUDGE. *Reversed, with directions.*

Walter R. Johnson, Attorney General, Rush C. Clarke and *John Adams, Jr.*, for appellant.

G. E. Hager, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

JOHNSEN, J.

The state on the relation of the attorney general brought injunction proceedings against Home Savings & Loan Association and Mount Zion Baptist Church (Colored), of Lincoln, to prevent diversion of the use of a certain lot in the city of Lincoln from that prescribed by chapter 92, Laws 1883. The trial court dismissed the petition, and plaintiff has appealed.

Chapter 92, Laws 1883, reads as follows:

"An Act to dedicate to the use of the Mount Zion Baptist Church (Colored) lot number 6 in block 179 in the city of Lincoln.

"Be it enacted by the legislature of the state of Nebraska:

"Section 1. That lot number six in block one hundred and seventy-nine in the city of Lincoln in this state is hereby dedicated to the use of the 'Mount Zion Baptist Church' (Colored), of the city of Lincoln: Provided, however, that said church shall within one year from the passage of this act use and occupy such lot for church purposes; and provided further, that if at any time such church shall abandon the use of said lot for the period of one year the title to said lot shall revert to this state and be disposed of in the manner provided by law for the sale and

disposition of other lots in the city of Lincoln, belonging to the state.

"Section 2. All acts and parts of acts in conflict with this act are hereby repealed.

"Approved February 24th, A. D., 1883."

Defendant Mount Zion Baptist Church (hereinafter referred to as the church) is a religious association organized in 1883. It has occupied and used lot 6, block 179, for church purposes, ever since the enactment of chapter 92, Laws 1883. It duly erected an edifice thereon, and in 1925 obtained a mortgage loan from defendant Home Savings & Loan Association (hereinafter referred to as the loan association) for $8,000, and executed a purported mortgage on the real estate. The mortgage later was foreclosed, and the loan association took sheriff's deed to the property and obtained an order directing that it forthwith be placed in possession.

When it sought to take possession and to oust the church from the property, the state brought this proceeding. The contention of the state is that the Act of 1883 merely gave the church the use of the property for church purposes, for the benefit of its adherents and the public, and thereby created a religious trust, and that the ousting of the church and the taking of possession by the loan association would be a violation of the dedication and a diversion of the use, which the state was entitled to enjoin.

The loan association's position is that the Act of 1883 was a grant of the fee title to the property, defeasible if the church abandoned the use thereof for a year; that the present suit was accordingly premature; and that the state was in any event estopped to maintain this proceeding.

We are not here concerned with the technical distinction at common law between a dedication and a grant. While the Act of 1883 uses the term dedicate in both its title and body, it must, by modern construction at least, be held to constitute a grant. The question then becomes whether it is a grant of the use or of the fee. It is entitled "An Act to dedicate to the use of the Mount Zion Baptist Church"

the property described. The body of the act provides that such property "is hereby dedicated to the use of the 'Mount Zion Baptist Church,'" if it be used and occupied for church purposes within one year. It will be noted that it is the property itself that is dedicated or granted to the church. True, the grant is made for a particular use or purpose, but there is a sound legal distinction between a grant of property, with a limitation upon its use, and a grant of the use only. If anything further were needed to convince that it was the fee, and not simply the use of the property, which the Act of 1883 intended to grant, it is contained in the proviso in the act that, if the church abandoned the use of the lot for a year, "the title to said lot shall revert to this state." What the church got under the legislative grant, therefore, conditioned, of course, on the use and occupancy of the property within a year for church purposes, was an estate in fee simple defeasible, with a limitation upon its use. 1 Restatement, Property, ch. 4. Whether it was a fee simple determinable or a fee simple subject to a condition subsequent is immaterial to the disposition of this case, and need not now be decided.

In holding that the Act of 1883 was a grant of the title, we have not overlooked the rule that public grants generally are construed liberally in favor of the state and against the grantee. 2 Lewis' Sutherland, Statutory Construction (2d ed.) 1020, sec. 548; 22 R. C. L. 273, sec. 35; *Dubuque & P. R. Co. v. Litchfield*, 23 How. 66, 16 L. Ed. 500; *Langdon v. Mayor, etc., of City of New York*, 93 N. Y. 129. This rule, however, requires a common-sense and not a forced application. A natural and reasonable interpretation must be resorted to in determining the extent of a grant. 59 C. J. 1122. In this connection, it may be pointed out that the legislature has declared generally, without any exception in favor of the state, that "Every conveyance of real estate shall pass all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used." Comp. St. 1929, sec. 76-106. Whether this statute applies to grants by deed only, and not to grants by legis-

lative acts, we need not here consider. It is referred to simply to emphasize the point that, under any circumstances, the court must look at a public grant straight forwardly and give it a natural and common-sense construction. Even without regard to section 76-106, therefore, we are clearly of the view that what the Act of 1883 intended, and appropriately did, was to grant the church a fee simple defeasible title to the property.

The next question is whether the state in this situation can maintain an action to prevent a diversion of the use for which the property was granted. The grant to the church was, of course, for a public purpose and one of public benefit, since it was a grant for charitable purposes. *In re Estate of Douglass,* 94 Neb. 280, 143 N. W. 299. In fact, only on this theory would it be sustainable at all, since the legislature was prohibited from donating public lands to private corporations. Const. 1875, art. III, sec. 18. It constituted, however, a direct grant to the church, and not one in trust, but to a large extent it is subject to the same rules as a charitable trust.

In 2 Restatement, Trusts, Introductory Note, Charitable Corporations, p. 1093, it is said:

"Property may be devoted to charitable purposes not only by transferring it to trustees for such purposes, but also by transferring it to a charitable corporation for any of the purposes for which the corporation is organized or for a particular one of its purposes. Where property is given to a charitable corporation, a charitable trust is not created. * * *

"Although a gift to a charitable corporation for one or for any of its purposes does not create a charitable trust, the rules of law which are applicable are to a large extent those which are applicable to charitable trusts, since the ends to be served are the same. The differences are due to the fact that different juridical devices are employed."

As to charitable trusts, the attorney general has long been recognized as having the right, in the absence of some statutory limitation, to maintain an action for en-

forcement of the trust, or to prevent a misuse of the property. 10 Am. Jur. 668, sec. 115.5. In 2 Restatement, Trusts, sec. 391, the following statement is made: "Since the community is interested in the enforcement of charitable trusts, a suit to enforce a charitable trust can be maintained by the attorney general of the state in which the charitable trust is to be administered."

The right of the attorney general to maintain such an action is not limited to cases of charitable trusts, but it may be exercised also in cases of gifts to charitable corporations involving a general public interest. This is the view declared by the American Law Institute. "The attorney general can maintain a suit not only to enforce a charitable trust but also to compel a charitable corporation to apply property held by it to the charitable purposes for which it was given to the corporation." 2 Restatement, Trusts, Introductory Note, Charitable Corporations, p. 1094. The rule certainly is a salutary one as applied to a grant which the state itself has made to a charitable corporation for a particular use or purpose. The public interest and purpose necessary to support such a grant of public land in the first instance clearly must be held to be equally sufficient to entitle the state to prevent the property from being diverted to any other use.

The loan association argues that the rights of the state are limited by the provision for reverter, and that no action of any nature can be maintained by it until its reverter rights have accrued. Such a view would hardly further the public purpose for which the legislative grant was made, but would, on the contrary, tend to defeat it. Quite clearly, the interest of the public lies in continuing the use of the property for church purposes by the Mount Zion Baptist Church, and not in hastening a reverter. There could have been no justification for the grant otherwise. The reverter provision, therefore, was intended, in part at least, to encourage and insure the use of the property pursuant to the grant, and to effect a return of the property only when, by abandonment, its continued use for such purpose had been

made hopelessly impossible. It was not designed to restrict the right of the state to enforce the terms and purpose of the grant by preventing a diversion of its use.

The attorney general was accordingly entitled to prevent such a diversion on the part of either the original grantee or a third party, and injunction was the proper remedy therefor in this case. It is unimportant upon what technical ground the equitable jurisdiction is predicated,—whether (1) that a grant of public lands to a charitable corporation, though not technically a trust, savors sufficiently thereof, by reason of the public interest and purpose necessary to support the grant; or (2) that the loan association, under its sheriff's deed in this case, became the holder of the title subject to the limitations of the original grant, and so was constituted a trustee for the continued use of the property, for church purposes, by Mount Zion Baptist Church and its adherents; or (3) that the limitation in the Act of 1883, upon acceptance of the grant, constituted a restrictive agreement, on the part of the original grantee and any subsequent holder of the title, to use the property only on the terms and for the purposes for which it was granted, which was enforceable by an injunction, in the nature of specific performance (4 Pomeroy, Equity Jurisprudence (4th ed.) secs. 1341, 1342, 1343).

The contention of the loan association that the state is estopped to maintain this proceeding requires only a momentary consideration. It is argued that the state is not entitled to maintain this suit because it failed to take any steps to keep the loan association from making a mortgage loan on the church property, and because it has not offered to pay the amount of the loan association's indebtedness, which was used to pay for improvements on the property. It is further argued that the state waived any right it may have had to maintain this suit, when it refused to become a voluntary party to the mortgage foreclosure proceedings. These contentions are disposed of by the nature of the relief herein granted.

As has already been suggested, if the sheriff's deed oper-

ated to vest legal title in the loan association, such title was taken subject to the purpose and use fixed by the Act of 1883. Under the legislative grant, it was intended that the property should be used only for church purposes and by the Mount Zion Baptist Church. Its use for any other purpose or by any other party would constitute a diversion. In this situation, no one could acquire title to the property except as a trustee. If the loan association chose to take a mortgage on such a title, and, through foreclosure, to acquire a naked legal title to the property, as a trustee, it was, of course, at liberty to do so. As against the state, however, it could not divert the use of the property, or, in other words, prevent its use by Mount Zion Baptist Church for church purposes. Obviously, the grounds urged as an estoppel against the state would not under these circumstances prevent it from enjoining the diversion threatened in this case.

The judgment is reversed and the cause remanded, with directions to enter a decree in conformity herewith.

REVERSED.

MARY IRENE HAWLEY ET AL., APPELLEES, V. MERTIE M. ARNOLD, APPELLANT.

288 N. W. 823

FILED NOVEMBER 28, 1939. No. 30677.

1. **Homestead.** While a homestead cannot be claimed in two separate properties at the same time, a homestead claimant who is about to lose his homestead as result of foreclosure proceedings may abandon the same and establish a new homestead in other property.
2. ———. A building consisting of a single structure and under one roof, though divided into two parts by a solid wall, is a "dwelling-house" within the meaning of the homestead statute.
3. ———. Finding of trial court that there was no equity in property over and above encumbrances and homestead exemption *held* sustained by the record.
4. ———. "The extent of a homestead is not to be determined from the fee-simple value of the land, but from the value of the

homestead claimant's interest therein." *Hoy v. Anderson*, 39 Neb. 386, 58 N. W. 125.

APPEAL from the district court for Lincoln county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

Hoagland, Carr & Hoagland, for appellant.

E. H. Evans and *Urban Simon, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, MESSMORE and JOHNSEN, JJ., and KROGER and ELLIS, District Judges.

KROGER, District Judge.

This is an action in equity brought by Mary Irene Hawley and William Hawley, wife and husband, to have a judgment in favor of Mertie M. Arnold declared not to be a lien upon certain premises claimed as a homestead. From a decree granting plaintiffs substantially the relief prayed for, this appeal is prosecuted by the defendant.

The record discloses that Mary Irene Hawley is the owner of lot 12 and the east one-half of lot 11, block 8, North Platte Town Lot Company's Addition to North Platte, Lincoln county, Nebraska, and since December 31, 1933, plaintiffs have occupied said premises as their homestead; that on the 15th day of January, 1934, Mary Irene Hawley, and her husband, mortgaged said premises to the Occidental Building & Loan Association to secure a loan of $5,000; on the 3d day of February, 1934, a deficiency judgment was entered against Mary Irene Hawley and William Hawley in favor of Mertie M. Arnold in the sum of $1,500; on February 16, 1938, this action was instituted against Mertie M. Arnold to have the title to said premises quieted in plaintiffs and the judgment of the defendant canceled, set aside and decreed not to operate as a lien or to cloud the title to plaintiffs' homestead property; issues were joined on this petition and decree entered, finding generally in favor of the plaintiffs and against the defendant, finding that the premises in question constituted the homestead of the plaintiffs, and that, at the time of the entry of the decree, there was no equity over and above the mortgage and homestead

exemption upon which the judgment lien could operate, and decreeing that the apparent lien of the judgment should be removed and adjudged not to operate as a lien on said premises, "without determining that such may not become a lien in the future, depending upon future events."

It is the contention of appellant that appellees had at one time claimed lots 1 and 2 in block 24 of North Platte Town Lot Company's Addition to North Platte as their homestead, and were claiming it as such when the decree of foreclosure was entered, out of which decree the deficiency judgment of $1,500 arose, and that they are now estopped from claiming a homestead in other property; that even if they are entitled to a homestead in the premises in controversy, all of the improvements cannot be claimed as exempt, for the reason that the improvements are a duplex, consisting of separate six-room houses, separated by a solid wall, and one of which units has never been occupied by the plaintiffs, but has been leased to tenants as revenue producing property; that the value of said premises is more than the encumbrances and the homestead exemption; and that the judgment lien attaches to any interest in the property above the homestead exemption, notwithstanding prior encumbrances on the property.

As to appellant's first contention, the record discloses that appellees did occupy and claim as their homestead lots 1 and 2 in block 24 of North Platte Town Lot Company's Addition to North Platte up until the time they vacated the same in December, 1933. It is equally clear from the record that, beginning with December 31, 1933, the appellees occupied and claimed as their homestead the premises involved in this action, and we know of no rule of law which would prevent the appellees from so claiming a homestead interest in the latter property and none has been called to our attention by appellant in her brief. Their former homestead was about to be taken from them by foreclosure proceedings, and they had a perfect right to select a new homestead, which was done in this case; the appellees having made their selection and occupied the premises as their

homestead before the deficiency judgment was entered, they were then entitled to their homestead exemption in the premises as against appellant's judgment.

With reference to appellant's next contention that all the improvements on the premises are not exempt, for the reason that the improvements consist of a duplex structure, consisting of two separate dwellings divided by a solid wall, the record discloses that the improvement is a single unit, all under one roof and a single structure, although there is a dividing wall through the building separating the same into two divisions with separate basements and separate heating plants. Under these circumstances, it cannot be said that the improvements are separate structures on the same premises, and we hold that the entire improvement constituted appellees' homestead.

In a similar situation, this court, in the case of *Corey v. Schuster,* 44 Neb. 269, 62 N. W. 470, speaking through Commissioner Ragan, used the following language: "The law does not contemplate by the word 'dwelling-house' any particular kind of house. It may be a 'brown stone front,' all of which is occupied for residence purposes, or it may be a building, part of which is used for banking or business purposes, or it may be a tent of cloth. All that the law requires on the subject is that the homestead claimant and his family should reside in this habitation or dwelling-house, whatever be its character, on the premises claimed as a homestead." And it was held that, where the first floor of a structure was used for mercantile purposes and the second floor for residential purposes, the entire building constituted the family homestead. See, also, the case of *Hess v. Eselin,* 110 Neb. 590, 194 N. W. 469, where it was held that an apartment house, in which mortgagor lived with his family, constituted a homestead; and the case of *Foltz v. Maxwell,* 100 Neb. 713, 161 N. W. 254, where a hotel was held to constitute a homestead, where a portion of the same was occupied by the homestead claimant.

Appellant's contention that the value of the property exceeds the homestead exemption and the encumbrances

thereon is not borne out by the record. While in her brief the appellant argues that the mortgage had been reduced to $3,425.49 as of September 12, 1938, there was no evidence introduced at the trial supporting that allegation. It is true that to the bill of exceptions there is attached an exhibit, designated as "Exhibit A," which is a copy of a petition in foreclosure filed by the Occidental Building & Loan Association against the Hawleys, and in which it is alleged that the amount due on said $5,000 mortgage as of September 12, 1938, is $3,425.49, but this exhibit was not introduced in evidence, and the record is bare of any testimony as to the amount of encumbrances against the property, except as of February 3, 1934, and the testimony is that on that date the encumbrance was $5,024.

There were three witnesses who testified as to the value of the premises at the time of the trial, two on behalf of plaintiffs and one produced by the defendant. One of plaintiffs' witnesses placed the value at $5,000. The other placed it at $6,500. Defendant's witness first placed the value at $7,500, but on cross-examination stated that, for the purpose of sale at that time, he would place the value at $6,750.

The trial court's finding that there was no equity in the property, over and above the encumbrances and the homestead exemption, is amply sustained by the record.

Appellant's final contention that a judgment lien attaches to any interest in the property above the homestead exemption, notwithstanding a prior encumbrance, has been disposed of adversely to her by this court in the cases of *Hoy v. Anderson*, 39 Neb. 386, 58 N. W. 125, and *Mundt v. Hagedorn*, 49 Neb. 409, 68 N. W. 610, where it was held that the extent of the homestead interest is not to be determined from the fee-simple value of the property, but from the value of the homestead claimant's interest therein.

The judgment of the trial court was right and is

AFFIRMED.

VERNER MARKEL, APPELLANT, V. RICHARD GLASSMEYER, APPELLEE.

288 N. W. 821

FILED DECEMBER 8, 1939. No. 30646.

1. **Appeal.** It is not error for the district court to permit an answer to be withdrawn and a general demurrer to be filed, if the petition fails to state a cause of action, even if the case has been theretofore under consideration in this court, if previously no objection has been made to the sufficiency of such petition.
2. **Pleading.** By pleading to the merits, the defect that the petition does not state a cause of action is not waived.
3. **Limitation of Actions.** An action by a husband (plaintiff) for damages resulting to him on account of, and occasioned by, an assault and battery committed upon plaintiff's wife by the defendant is barred unless brought within one year after the cause of action accrued.

APPEAL from the district court for Cass county: WILMER W. WILSON, JUDGE. *Affirmed.*

Lloyd E. Peterson, for appellant.

Moran & James, Spencer & Neumeister and *W. A. Robertson, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

EBERLY, J.

This action was commenced in the district court for Otoe county on August 10, 1935, by Verner Markel, as plaintiff, against Richard Glassmeyer, the defendant. To summarize, it may be said that the petition alleged that on February 5, 1934, the defendant unlawfully made an assault on the body of plaintiff's wife, Sena Markel, and did then and there beat, wound and ill-treat said Sena Markel, whereby said Sena Markel sustained (here follows a specific description of the injuries inflicted). And it was further alleged that, as a direct result of said unlawful assault and on account of the injuries sustained by plaintiff's wife, medical services were required to the extent of $36.50; to

the extent of $150 for employing household help; and $5,000 for deprivation of the wife's services, society, comfort, and association. To this petition defendant filed his answer, and to this answer plaintiff replied. A trial of the issues to a jury resulted in a verdict and judgment for the plaintiff. An appeal to this court resulted in a reversal of the judgment entered in the district court because of the erroneous admission of incompetent evidence at the trial, and the case was remanded generally "for further proceedings." *Markel v. Glassmeyer*, 132 Neb. 716, 273 N. W. 33.

The record before this court discloses no challenges made to the sufficiency of the petition during the first trial or on appeal. After the filing and entry of the mandate, the district court sustained the motion of the defendant for leave to withdraw his answer to plaintiff's petition, for the purpose of demurring to plaintiff's petition. Thereupon, a general demurrer was filed by defendant, which, in appropriate language, challenged the sufficiency of the petition to state a cause of action against defendant, for the reason that it accrued more than one year prior to the commencement of the suit. This demurrer was sustained by the trial court. Thereafter, plaintiff then declining to plead further, his petition was dismissed at his own cost. Plaintiff now appeals.

His first challenge is to the power of the district court to permit the withdrawal of the defendant's answer and the filing of his general demurrer. Under the circumstances set forth in this record, this was plainly a matter of judicial discretion exercised by the trial court.

In *Edney v. Baum*, 70 Neb. 159, 97 N. W. 252, this court held:

"It is not error for the district court to permit answers to be withdrawn and a general demurrer to be filed, if the petition fails to state a cause of action, even if the case has been four times under consideration in this court, if no objection has been made to its sufficiency.

"By pleading to the merits, without raising them, a party

waives all defects by way of misjoinder or defect of parties, but not the lack of jurisdiction in the court, nor that the petition does not state a cause of action."

Appellant further challenges the correctness of the dismissal of his action by the trial court. He insists that, his action being for the loss of a wife's services, for medical expenses, and for other expenses of a wrongful attack by another upon her, it is within the words of section 20-207, Comp. St. 1929, prescribing a four years' limitation to an action "for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated." The trial court, it is evident, applied the provisions of section 20-208, Comp. St. 1929, which, by its terms, is applicable to causes of action for assault and battery.

Our first statute of limitations applicable to the facts here in dispute was enacted by the territorial legislature of 1855. It provided: "First.—Actions of slander, libel, malicious prosecution, injuries to the person, or for a statute penalty, within two years; * * * Third.— * * * and all other actions not otherwise provided for in this respect (were required to be brought), within five years." Vol. 1, Complete Session Laws of Nebraska, 1855 to 1865, p. 25.

In 1858 the present Code of Civil Procedure was enacted. The limitations provided for by the act of 1855 were repealed, and in lieu thereof the following was adopted:

"Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued." Comp. St. 1929, sec. 20-204 (Code, sec. 9).

"Within four years * * * an action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated." Comp. St. 1929, sec. 20-207 (Code, sec. 12).

"Within one year an action for libel, slander, assault and battery, malicious prosecution, or false imprisonment," etc. Comp. St. 1929, sec. 20-208 (Code, sec. 13).

The essential attribute of a statute of limitations is that it accords and limits a reasonable time within which a suit

may be brought upon causes of action which it affects. Limitations are created by statute and derive their authority therefrom. They evidence a public policy formally declared by the legislative department of government; and as applied to each classification made by it are based upon the similarity of the intrinsic or inherent elements which the causes of action so classified comprise, considered with reference to the nature of proof required to establish the existence of the same. So considered, the adopted policy of this state has announced a limitation of "within one year" for "an action for assault and battery," irrespective of the plaintiff who may institute the same. There is nothing in the context of the present statute of limitations above quoted which indicates that the words "action for assault and battery" are used in a narrow sense, or that the actions referred to are only those brought by the person suffering the physical impact. Indeed, whether the action be instituted by the husband for injuries sustained by him occasioning damages to himself, or be brought by the wife, the causative factor or element still remains the "assault and battery," as to which the nature of the proof required would be identical. It is evident that they were so considered by the legislature in fixing this period of limitation so declared. If the language "action for assault and battery" be accorded the interpretation which we find adopted by the standard lexicographers, the word "for," as thus employed in the language under consideration, has the ordinary signification of "on account of," "because of," "by means of," or "growing out of." *Mulvey v. City of Boston*, 197 Mass. 178, 83 N. E. 402, 14 Ann. Cas. 349.

Thus, it appears that the language employed in our one-year statute of limitations applicable to assault and battery is fairly inclusive of the cause of action set forth in plaintiff's petition. In addition, it forms a part of section 20-208, Comp. St. 1929, thus being within the purview of the phrase "not hereinafter enumerated" as employed in section 20-207, Comp. St. 1929, which precedes it in the original enactment. Also, we are committed to the rule of

construction that, "Where different parts of the same statute are in irreconcilable conflict, the last words stand, and those in conflict therewith are disregarded." *Van Horn v. State,* 46 Neb. 62, 64 N. W. 365. It therefore appears that the action of the trial court in the dismissal of plaintiff's action based on that fact is correct.

It may be said that this is a case of first impression in this jurisdiction, and that the authorities elsewhere are not in harmony.

The principle here approved is sustained by, or is consistent with, the doctrines announced in the following cases, viz.: *Basler v. Sacramento Electric, Gas & Ry. Co.,* 166 Cal. 33, 134 Pac. 993; *Cravens v. Louisville & N. R. Co.,* 188 Ky. 579, 222 S. W. 930; *United States Fidelity & Guaranty Co. v. Blue Diamond Coal Co.,* 161 Va. 373, 170 S. E. 728; *Mullen v. Town of Newcastle,* 180 Ind. 386, 103 N. E. 1; *Mulvey v. City of Boston,* 197 Mass. 178, 83 N. E. 402, 14 Ann. Cas. 349; *Maxson v. Delaware, L. & W. R. Co.,* 112 N. Y. 559, 20 N. E. 544; *Black v. Eastern Pennsylvania Rys. Co.,* 257 Pa. St. 273, 101 Atl. 644; *Blackwell v. Memphis Street R. Co.,* 124 Tenn. 516, 137 S. W. 486; *Johnston v. Southern R. Co.,* 155 Tenn. 639, 299 S. W. 785.

Deeming that reversible error was not committed by the district court in the instant case, its judgment is

AFFIRMED.

PHYLORY R. DOLEN, APPELLANT, V. BEATRICE RESTAURANT COMPANY, APPELLEE.
289 N. W. 336

FILED DECEMBER 8, 1939. No. 30653.

New Trial. When the amount of damages allowed by a jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict.

APPEAL from the district court for Gage county: CLOYDE B. ELLIS, JUDGE. *Reversed.*

Bruce Fullerton and *Ladd J. Hubka,* for appellant.

Rexford C. Rankin and *H. F. Mattoon, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

EBERLY, J.

This is an action for damages wherein the plaintiff, Phylory R. Dolen, sued the defendant, the Beatrice Restaurant Company, for bodily injuries sustained by her on February 1, 1938, in, accidentally and without negligence, falling down a dangerous stairway which plaintiff alleged the defendant negligently maintained in its place of business, and which, her petition sets forth, was dark and "hidden" and constituted "a trap." The nature of the injuries received by her, by reason of this accident, are specifically set forth, and she alleges that, as a result thereof, she has expended or become liable for doctor bills, nurse hire, and hospital bills; she has lost her entire earning power and will be unable to carry on her business in the future; she has been permanently injured; and has suffered and still suffers great and excruciating pain, all to her damage in the sum of $21,000, for which judgment was prayed.

The defendant in its answer admitted that the plaintiff on or about the 1st day of February, 1938, fell down a stairway in defendant's place of business, and denied each and every other allegation in plaintiff's petition contained. Also, contributory negligence of the plaintiff is pleaded. Plaintiff joined issues by her reply filed.

Trial was had, at the close of which the trial jury returned a verdict in which they "find for the plaintiff and against the defendant and assess the amount of her recovery at the sum of $700." Plaintiff thereupon filed her motion for a new trial, and from the order of the trial court overruling the same, she now appeals. The defendant filed no motion for a new trial and has not appealed.

An examination of the evidence preserved in the bill of exceptions discloses that while the case involved conflicting proof it contains ample evidence, if believed, to sustain

the finding for the plaintiff. The question as to whether the amount of damages allowed by the jury is clearly inadequate under the proof made is controlling.

A determination of the questions submitted by the trial court required either a verdict in favor of the defendant, or a verdict in favor of plaintiff for substantial damages.

On the subject of damages, the trial court instructed the jury, viz.:

"The jury are instructed that, if you find from a preponderance of the evidence that the plaintiff is entitled to recover in this action, she will be entitled to recover such an amount as will fairly and reasonably, but not excessively, compensate her for the physical injuries sustained by reason of the accident, which would also include fair and reasonable compensation for mental and physical pain and suffering which she may have sustained, for the diminution of plaintiff's capacity to carry on her occupation or business and fair and reasonable sums which she has paid or incurred for necessary medical, hospital and like expenses, as shown by the evidence."

There is evidence in the record which sustains every element of recovery referred to in the foregoing instruction, including value of personal earning power of which the accident deprived her. In addition, it is established by uncontradicted evidence that the doctor bills, the nurse hire, and the hospital expenses, including ambulance expenditures, all reasonably and necessarily incurred, amounted to the sum of $994. Therefore, the jury disregarded both the instruction of the court and evidence wholly undenied, as to necessary doctor bills, hospital fees, nurses, and ambulance hire; and also denied plaintiff substantial recovery for the injuries sustained by her, and for pain and suffering occasioned thereby, as clearly established by the proof. The instructions given did not permit the jury to award a recovery by plaintiff of a clearly inadequate sum. In the instant case the amount awarded the plaintiff for damages is established by clear, unequivocal testimony to be grossly inadequate.

The rule is, viz.: "When the amount of the damages allowed by a jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict." *Preston v. Farmers Irrigation District,* 134 Neb. 503, 279 N. W. 298. See, also, *Meier v. Bridgeport Irrigation District,* 113 Neb. 344, 203 N. W. 543; *Mares v. Chaloupka,* 110 Neb. 199, 192 N. W. 397.

We think that the verdict returned is not only grossly inadequate, but that it must have been rendered under the influence of passion and prejudice. *Ellsworth v. City of Fairbury,* 41 Neb. 881, 60 N. W. 336.

It follows that the district court erred in its overruling of plaintiff's motion for a new trial. The judgment of the district court is, therefore, reversed and the cause remanded for further proceedings.

REVERSED.

NICK VALLAS V. STATE OF NEBRASKA.
288 N. W. 818

FILED DECEMBER 8, 1939. No. 30727.

1. **Homicide.** In a prosecution for shooting with intent to kill or wound, it is error to instruct the jury that the law warrants the presumption or inference that a person intends the results or consequences to follow an act that he intentionally commits which ordinarily do follow such act, where the witnesses to the shooting were present at the time of the shooting and testified fully thereto and to the attendant circumstances.
2. ———. In a prosecution for shooting with intent to kill or wound, intent is one of the essential elements of the offense charged, and a presumption of law does not take the place of evidence of witnesses who were present at the time and detailed the shooting and the attendant circumstances thereof.

ERROR to the district court for Scotts Bluff county: CLAIBOURNE G. PERRY, JUDGE. *Reversed.*

William Morrow, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Clarence S. Beck, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

Plaintiff in error (hereinafter referred to as defendant) was charged in an information with shooting with intent to wound, and on the second count with shooting with intent to kill. The jury returned a verdict of guilty of shooting with intent to kill. Motion for a new trial was overruled, and the defendant sentenced. He brings error to this court for review.

The record discloses the following pertinent facts, in substance: Defendant, on February 23, 1939, the date of the offense charged, loaned his automobile to Elsie Adams, as he had done on other occasions. She was to drive to the home of her brother, Edward Curtis, and he was to drive the car for her as directed by the defendant. Before she left, defendant removed a gun from a compartment in the car and placed the gun in his pocket. She met Tony Guzman about 10 o'clock in the morning and they agreed to meet at 6 o'clock in the evening at the Eagle Café in Scottsbluff. Elsie Adams, her brother, his wife, and Tony Guzman went to a show, leaving the theater shortly after 11 p. m. Guzman drove the car and delivered Curtis and his wife at their home, and she and Tony proceeded to his place of residence about three miles east of Scottsbluff. There is evidence that they took an indirect route.

The defendant went to the Curtis home, asked Edward where the car was, and was told that Elsie had just left with it. Curtis then went to Elsie's home in Gering, to watch over the children and to bring back the car. Elsie's husband, Noah Adams, then appeared at Elsie's home, accompanied by John Vohland, and there was some conversation among them about Elsie. Finally, it was decided that Noah Adams, Curtis and the defendant would go with Vohland in his car in search of Elsie. They located Elsie and Tony near his residence and sought to stop him. Guzman put the car in reverse, backed up quickly into a farm

driveway and turned around, proceeding at a high rate of speed to Scottsbluff, followed by Vohland and the others. Finally, Guzman was stopped on Broadway in the city.

Guzman stated that out on the highway, before arriving at Scottsbluff, defendant got out of the car, and he could see that defendant had a gun, and defendant "hollered for us to stop." Vohland stated he did not see defendant with a gun at that time. According to Guzman's testimony, when the car stopped in Scottsbluff defendant got out of the car and ran towards Guzman, appeared to be angry and called Guzman vile names, pointed the gun at him and fired. Guzman dodged and stated he could hear "the buzz of the bullet." The defendant was about 20 feet distant from Guzman at the time, and they were proceeding towards each other. Guzman said that defendant was going to hit him; "I grabbed his hand and pulled it up in the air and the next shot went up in the air." Guzman then pushed defendant, who fell down, and Guzman tried to obtain the gun. There was a scuffle, both trying to gain possession of the gun, the defendant calling for help. Vohland, so Guzman stated, struck him on the head, threatened him and called him a vile name. Guzman stated that defendant hit him on the head with his gun after he had fired the second shot. Curtis stated that he saw the defendant with a gun in his hand and saw him fire; that the gun was pointed at Guzman's head and that two shots were fired; he did not testify as to how the second shot was fired. The gun was .38-caliber, containing one load in the barrel and five in the magazine. One shell was found on the pavement by a police officer.

Vohland testified that at the time he got out of the car, and as he was going around it, he heard another shot; that Guzman was standing right in front of the door on the running-board of defendant's car, which he, Guzman, was driving; "he had clenched onto Nick (defendant) and they were scrapping standing up;" that Guzman jumped onto the defendant, "knocked him down and got on top of him and he was beating him, and the gun was on the cement and

they were scuffling around there trying to get the gun;" that the defendant was "yelling for help, * * * and as I got over there I shoved Tony Guzman right off of him—shoved him quite a ways onto the sidewalk;" he did not strike him but pushed him six or seven feet. Witness stated that defendant "staggered around there and he was getting up;" that Guzman "kind-a turned around and acted like he was going to come at me so I started after him again there and he started up the sidewalk and I followed him."

Defendant testified that when he got close to the car Guzman got off the running-board and jumped on him; that he did not pull a gun on or shoot at Guzman; that when he fell down the gun fell out of his pocket; that both he and Guzman tried to grab it; he, defendant, called for help. The evidence is not clear that two shots were fired, or the manner in which the second shot was fired, if at all. After the scuffling, Guzman proceeded towards the Eagle Café; the defendant got into his car and drove to Elsie Adams' home. Finding no one there, he then drove to Scottsbluff, where he had a business engagement, and was arrested en route. Elsie Adams did not testify at the trial, she being at her mother's home in Kansas at the time. There is evidence that the defendant took her to Kansas at her request.

The defendant complains of that part of instruction No. 6 reading: "The law warrants the presumption, or inference, that a person intends the results or consequences to follow an act which he intentionally commits, which ordinarily do follow such acts." The defendant likewise contends that the court erred in giving instruction No. 10, as follows: "To constitute the offense charged in this case the intent alleged in the information is necessary to be shown, but direct and positive testimony is not necessary to prove the intent. It may be inferred from the facts and circumstances shown by the evidence." The following part of the instruction is criticized: "And if you believe from the evidence, beyond a reasonable doubt, that the shooting, as alleged in the information, was done wilfully and inten-

tionally and was likely to be attended with dangerous consequences, the intent to kill or wound requisite to make out this case as charged may be inferred therefrom."

The authorities are agreed on the general proposition that, in a prosecution for assault with intent to kill, the specific intent to take life is the gist of the offense. The intent must be proved as charged. The jury should be instructed that before they can return a verdict of guilty they must be convinced from the evidence that the accused entertained a design to kill. 13 R. C. L. 799, sec. 103, cases cited under note 7.

The cases of *Curry v. State,* 4 Neb. 545, *Krchnavy v. State,* 43 Neb. 337, 61 N. W. 628, *Botsch v. State,* 43 Neb. 501, 61 N. W. 730, and *Ward v. State,* 58 Neb. 719, 79 N. W. 725, are cited in support of defendant's contention that the foregoing instructions, or parts thereof, given by the court, constitute error. The state analyzes the cases on the presumption of intent, citing in addition *Bruno v. State,* 111 Neb. 715, 197 N. W. 612, and *Styskal v. State,* 116 Neb. 8, 215 N. W. 465.

In the latter case the defendant waited in ambush to shoot a man who was paying unwanted attention to his wife. He did shoot him and wounded him. He shot him intentionally and such fact was admitted. The question for the jury to determine was the malicious intent, and whether or not the theory of the defense, that the defendant shot in defense of his wife and home, was supported by the evidence. The following instruction was given relative to the presumption of intent: "Upon the question of intent, you are instructed that the law presumes a sane man to intend the reasonable, probable and natural consequences of any act by him intentionally and voluntarily done, and this presumption will always prevail, unless, from a consideration of all the evidence bearing upon this point, you entertain a reasonable doubt whether such intention did exist." The giving of this instruction, that the defendant is presumed to have intended the reasonable, probable and natural consequences of his voluntary act, was held to be error under

the circumstances of the case. The court stated in the body of the opinion: "The burden of proving a criminal intent beyond a reasonable doubt by competent evidence was on the state throughout the trial. Presumptions of law did not take the place of such evidence or lessen or shift the burden of proof." The court further stated: "When the circumstances of the tragedy were detailed by eyewitnesses, convictions have been reversed time and again," citing numerous cases.

Most of the cases cited deal with instructions on the presumption of malice in homicide cases, the court declaring that an instruction which presumes malice, where the witnesses to the transaction are eyewitnesses, is erroneous, where malice is one of the principal ingredients of the offense charged; and among the cases cited is *Styskal v. State, supra,* a prosecution for shooting with intent to kill. So, apparently, the same principle of law applies in a case involving shooting with intent to kill or wound, where the witnesses to the shooting and attendant circumstances are eyewitnesses.

In the instant case, the shooting was denied; in *Styskal v. State, supra,* the shooting was admitted. However, in the instant case, as in the *Styskal* case, the shooting and attendant circumstances thereof were detailed by eyewitnesses. The only other witnesses were police officers, testifying to collateral facts. This case is distinguished from those cited by counsel for both defendant and the state on the instructions given, and in the case at bar the instruction is erroneous in any event for the reasons stated in *Styskal v. State, supra.* The rule in such case is:

Where the defendant is charged with assault with intent to kill or wound, and the details of the shooting and the attendant circumstances in reference thereto are testified to by eyewitnesses, instructions with reference to the presumption of law on intent should not be given, and, if given, constitute prejudicial error. The presumption of law does not take the place of such evidence or lessen or shift the burden of proof. In cases of this kind, intent is one of the

principal elements of the offense charged, and instructions on the burden of proof in this respect are proper; likewise, instructions, informing the jury as to matters to be taken into consideration in determining the intent, as found in *Botsch v. State, supra,* would be proper, but instructions that overstate or overemphasize the intent, as heretofore explained, in view of the testimony of eyewitnesses to the shooting and to the attendant circumstances, are erroneous and prejudicial as a matter of law.

In addition, instruction No. 10, as given by the trial court and heretofore quoted, is erroneous in that it uses the language "was likely to be attended with dangerous consequences." In the light of the record in the instant case, it stands to reason that the shooting would not be "attended with dangerous consequences." No discharge of a bullet from defendant's gun struck Guzman. The court anticipated that which could not happen under the circumstances of the case, and such instruction is prejudicial to the substantial rights of the defendant.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

NATHAN RESNICK, APPELLEE, V. SARAH RESNICK, APPELLANT.
288 N. W. 816

FILED DECEMBER 8, 1939. No. 30618.

Divorce. "Upon the granting of an absolute divorce, the trial court may assign the property, both real and personal, acquired during the marriage by the joint efforts of the parties, between them as the demands of equity may require." *Bigelow v. Bigelow,* 131 Neb. 201, 267 N. W. 409.

APPEAL from the district court for Douglas county: HERBERT RHOADES, JUDGE. *Affirmed.*

Webb, Beber, Klutznick & Kelley, Ginsburg & Ginsburg, Loyal G. Kaplan and *Harold R. Lebens,* for appellant.

Wayne E. Sawtell, contra.

Heard before SIMMONS, C. J., EBERLY, PAINE, MESSMORE and JOHNSEN, JJ., and CHAPPELL and KROGER, District Judges.

CHAPPELL, District Judge.

This is a divorce case. Appellee, hereinafter called plaintiff, was granted a decree of divorce from appellant, hereinafter called defendant, on the ground of extreme cruelty. Defendant's cross-petition was dismissed. She was awarded the custody of Helen Resnick, their 11-year old daughter, together with child support and a money judgment in lieu of permanent alimony.

Defendant contends that the trial court erred in refusing to permit their 11-year old daughter to testify in her behalf, and made an unjust and unlawful division of the property.

At the conclusion of plaintiff's case, defendant asked the court for permission to call the daughter, who had been previously excluded from the courtroom during the trial, as a witness. Whereupon, the trial court said, in substance, that she did not need to be out of school; that it had been his rule for about 12 years to never permit a child to go on the stand in such cases; that children of that age ought not to be put on the stand as they did not play much of a part in a divorce case. Counsel for plaintiff and defendant then suggested that the court talk to her alone, to which the court replied: "Not right now. We will take care of the little girl. I would suggest that you do this; I am refusing to let Helen, 11 years of age, be placed on the stand and if I were you I would take exception to it." Defendant's counsel then excepted to the ruling of the court and made an offer of proof, which was refused, the court saying: "If any occasion should arise that I would want to talk to the little girl, I will have somebody from this department go out and then I will talk to her. That is, if I am not satisfied with the evidence when we get through."

The record shows that the little girl had just spent several

months, from February 1, 1938, until August 12, 1938, in the Hattie B. Monroe home for children in Omaha because of a nervous condition which had been brought about by the unhappy conditions in her own home. The court knew about this at the time, and its refusal to permit her to testify was undoubtedly prompted by a desire of the court to further shield and protect her. The trial court had known about the serious marital difficulties of the parties extending over a period of years. Twice previously, in 1931 and 1935, the defendant had filed suit for divorce from plaintiff in the same court. In each instance a reconciliation had been effected; the last, after a hearing and with the aid and assistance of the trial court, believing it to be for the best interests of this child and a minor son who is now 20 years of age. An examination of the offer of testimony shows that her evidence could only be cumulative in any event, and, if admitted, we fail to see how it could have changed the result upon any issue of the case.

The legislature and the courts of this state have established uniform juvenile procedure in divorce cases and recognized the inherent power of the court to shield and protect innocent children. Section 43-203, Comp. St. 1929, provides: "The juvenile court shall have jurisdiction to hear and determine all cases for divorce or alimony or involving the custody of children, and the court, or in vacation any judge thereof, may, through any probation officers of the county or otherwise inquire into the same." Section 42-307, Comp. St. 1929, referring to divorce cases, says in part: "Provided, that it shall be the duty of the court to make independent investigations of the merits of all * * * cases where minor children are involved through a probation officer or county superintendent of child welfare or other agency." Defendant was not prejudiced by the refusal, and, under the circumstances, the trial court had a right to exercise its discretion and refuse the offer.

The important question is whether there was a just and lawful division of their property. Defendant was awarded the custody of Helen Resnick, the minor daughter, and $30

a month for such child's support until further order of the court. In addition, she was awarded absolutely all the household goods and furnishings in their home in Omaha; was freed from all debts and obligations of every kind and nature, and they were all imposed upon the plaintiff. The court found that plaintiff and defendant were the owners of certain real and personal property, all of which was accumulated by the joint efforts of both the plaintiff and the defendant since their marriage, and that their joint estate had a net worth of approximately $8,500 which should be divided equally between them after deducting certain sums already received by defendant. After assigning the business and the real estate to plaintiff, the court awarded defendant, in lieu of permanent alimony, the sum of $4,065, payable $45 a month until fully paid, or, in the alternative, $30 a month if defendant lives in plaintiff's property, in which event credit is to be given the plaintiff of an additional $15 a month as rental therefor. The costs were all taxed to plaintiff and he was required to pay his own attorney fees and $50 to defendant's attorneys. *In toto,* defendant was awarded $75 a month from plaintiff.

While some of the real estate stood in defendant's name, it is undisputed that plaintiff and defendant accumulated all of their property and money during their marriage by the joint efforts of both of them in the same business venture. The court, therefore, had the equitable power to divide it between them in such manner as it deemed just and equitable. In *Bigelow v. Bigelow,* 131 Neb. 201, 267 N. W. 409, this court said: "Upon the granting of an absolute divorce, the trial court may assign the property, both real and personal, acquired during the marriage by the joint efforts of the parties, between them as the demands of equity may require." Other authoritative Nebraska cases are cited therein.

The contention that defendant is put to hazard of loss by an alimony judgment for money payable by the month is answered by reference to section 42-319, Comp. St. 1929:

"All judgments and orders for payment of alimony * * * in actions of divorce * * * shall be liens upon property in like manner as in other actions, and may in the same manner be enforced and collected by executions and proceedings in aid thereof, or other action or process as other judgments." In addition, section 42-320, Comp. St. 1929, "The remedy given by the next preceding section shall be held to be cumulative and in no respect to take away or abridge any subsisting remedy or power of the court for the enforcement of such judgments and orders," preserves to defendant the remedy of civil contempt. See *Cain v. Miller*, 109 Neb. 441, 191 N. W. 704; *Maryott v. State*, 124 Neb. 274, 246 N. W. 343; *Thomas v. Thomas*, 132 Neb. 827, 273 N. W. 483.

A careful examination of the record discloses that the trial court correctly decided the issues herein and made a lawful, just, and equitable division of the property, and the judgment is

AFFIRMED.

UNION CENTRAL LIFE INSURANCE COMPANY, APPELLANT, V. NOEL COVER, APPELLEE.

289 N. W. 331

FILED DECEMBER 15, 1939. No. 30635.

1. **Specific Performance.** Plaintiff contracted to convey certain lands to the defendant, and the defendant agreed to purchase the same. Differences arose, and plaintiff brought this action to rescind the contract and for other relief. The trial court denied the rescission prayed for by plaintiff. Under the facts set out in the opinion, the judgment of the trial court in that regard is not disturbed.
2. **Vendor and Purchaser.** Defendant contracted to assume full responsibility for the maintenance of the buildings and improvements on the premises from the date fixed for full performance by the contract of purchase. Subsequent thereto and pending negotiations for settlement, defendant entered into possession of the premises and exercised rights of ownership thereto. *Held*, that defendant was not entitled to a reduction

in the purchase price for any waste or depreciation occurring to the buildings after the date fixed for performance of the contract and after he entered into possession of the premises.

3. **Waters.** Charges for irrigation water sold and delivered to land are not a lien upon the land unless made so either by statute or by contract. In order to create such a lien on land by contract, the language used must be definite and specific, and must by its terms be a direct declaration that such a lien is created.
4. **Decree.** The record is examined, the decree of the trial court modified, and the cause reversed and remanded, with instructions.

APPEAL from the district court for Dawson county: ISAAC J. NISLEY, JUDGE. *Affirmed as modified.*

Hamer, Worlock, Randall & Tye, for appellant.

Hoagland, Carr & Hoagland, contra.

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

SIMMONS, C. J.

The appellant was the plaintiff and the appellee was the defendant in the court below. They will be referred to herein as plaintiff and defendant.

This is an equity action brought to rescind and cancel an agreement to purchase real estate, to foreclose any interest of the defendant therein, to quiet title in the plaintiff thereto, and for judgment for the use of the premises during the time that they have been occupied by the defendant. By his answer and cross-petition, defendant alleges a modification of the contract as to time of performance, a failure of the plaintiff to pay taxes and water-right assessments; damage to the buildings, orchard, and windbreak on the property subsequent to his contract to purchase; his inability to secure water because of plaintiff's failure to pay the water assessments, and loss of crops thereby; and prays for an accounting of the amount due and for specific performance of the contract as modified.

In June, 1934, the plaintiff was foreclosing a mortgage on a quarter-section of farm land in Dawson county. On

June 12, 1934, the defendant made a written proposal to purchase the property, which was accepted by the plaintiff on June 25, 1934. The agreed purchase price was $10,000, with $500 cash paid at that time, the remainder to be paid on or before March 1, 1935, by the payment of $1,500 in cash and the execution and delivery of notes and a mortgage for $8,000 payable in 10 years from January 1, 1935, with interest payable annually at 5 per cent., and 2 per cent. of the $8,000 payable annually after five years. The defendant accepted notice that foreclosure was in process and agreed that, if the plaintiff did not secure title, the contract was to be void and the $500 down-payment was to be returned with interest at 5 per cent. Defendant reserved the right to complete the contract "if possession and title can be given to me within a reasonable time after March 1, 1935."

Defendant agreed to "assume and pay the general taxes commencing with the year 1935, payable 1/1/36, and all other taxes and/or special assessments now levied or which hereinafter may be assessed or levied against said premises;" and further agreed "from March 1, 1935, * * * to assume full responsibility of the maintenance and upkeep of said premises, buildings and improvements and * * * keep said buildings insured." Final settlement was to be made, and a deed delivered "with warranty only as against your (plaintiff's) own acts * * * on or before March 1, 1935, or as soon as said title is shown to be merchantable."

The foreclosure was not complete, and plaintiff was not in a position to perform on March 1, 1935. Subsequent thereto, title vested in plaintiff by confirmation of foreclosure sale, and in October, 1935, plaintiff tendered to the defendant an executed deed together with note and mortgage for execution and asked for the payment of the $1,500. About that time, defendant had contacted plaintiff's agents and advised them that, inasmuch as he was not to receive possession so as to receive the beneficial use of the land for the year 1935, he did not feel that he should close the contract until March 1, 1936, and plaintiff agreed

to a modification of the contract to that extent. Plaintiff made another tender and demand for performance in February, 1937, and on November 29, 1937, following a final effort to secure settlement, plaintiff tendered the defendant a return of the $500 down-payment and notified defendant of the cancelation of the contract.

At the time of the tender in October, 1935, the 1935 taxes on the property in the sum of $427.26, and some prior taxes, had not been paid. Apparently, the 1935 taxes have not since been paid.

Defendant claimed that, subsequent to the date of the contract, the orchard and buildings had been damaged, and demanded a set-off of the damages against the purchase price, and refused to perform until said alleged damages were adjusted and allowed. In the spring of 1936, he fixed the amount of those damages at $2,600.

Following confirmation of the foreclosure sale, members of the family of the former owner remained in possession of the buildings until April, 1937.

In April, 1936, defendant (without complying with the contract and without notice to the plaintiff) entered into possession of the premises, farmed the same during the crop season of 1936, and since said time has remained in possession of the land. The defendant planted the land to alfalfa, claims to have secured a good stand, and that alfalfa was lost as a result of his failure to secure water. Defendant did not demand possession of the buildings from the plaintiff. Legal steps were not taken by either plaintiff or the defendant to secure possession of the buildings from the occupants. Defendant testified, however, that before March 1, 1936, the occupants asked him if they could stay in the buildings, and that "I told them I couldn't let them stay, I wanted them to get out of there."

At the time the buildings were vacated in April, 1937, they were in a poor state of repair. The barn was old in 1909 and not very well constructed. The house was old at that time. Repairs and additions were made to it in 1910 or 1911. The orchard and windbreaks were planted in

1909 and cared for up to, but not after, 1930. The defendant testified that the condition of the house was "good" on March 1, 1935, and "very good" on March 1, 1936, and that the barn "was in very good shape" on March 1, 1936. Within 30 or 40 days after the buildings were vacated in 1937, a large number of the windows in the house were out, plaster had fallen off, doors were off the hinges, a portion of the porch had sunk down and the barn collapsed in a heavy windstorm. The defendant contends that a large part of the supports on the inside of the barn were taken out during the period from March, 1936, to April, 1937, and that the barn collapsed as a result. That testimony is denied by parties in a position to know the facts. The defendant after March 1, 1936, made no effort to preserve the buildings or prevent waste being committed thereon. It appears reasonably clear that whatever depreciation, above ordinary wear and tear, suffered by the house occurred after it was vacated in April, 1937.

There was owing to the Cozad Ditch Company the sum of $210 for irrigation water maintenance charges for the years 1931 to 1935. Defendant contended that plaintiff should pay these charges with accrued interest. On May 7, 1937, defendant paid these charges, which, with interest, amounted to $295.26, and demanded credit therefor on the purchase price.

On September 30, 1938, the trial court entered its decree, finding that time for performance of the contract was extended to March 1, 1936; that the defendant was entitled to specific performance of his contract; that the plaintiff did not deliver possession of the buildings until 1937, and that, because of the damage thereto, the real estate had depreciated in value in the sum of $800; that he was entitled to receive the property with the 1935 general taxes paid; that defendant was entitled to credit for the maintenance taxes paid in the sum of $295.26 and for the $800 damages to the buildings; and that as of March 1, 1936, there was a balance due the plaintiff of $9,500. He deducted the maintenance and damages totaling $1,095.26 from the $9,500 and deter-

mined that the balance was $8,404.78 (should be $8,404.74), and upon that amount computed interest at 5 per cent. for 2 years and 7 months, which amounted to $1,085.70, making the total due the plaintiff, $9,490.48. The court further found that all over $8,000, to wit, $1,490.48, should be paid within 60 days from date, and that $8,000 should be evidenced by a note and mortgage payable March 1, 1946, with interest at 5 per cent. per annum, 2 per cent. of the $8,000 to be paid annually after March 1, 1941. The court further found that, upon the execution of the note and mortgage and the payment of $1,490.48, plaintiff should execute a good and sufficient warranty deed conveying clear title to said premises as of March 1, 1936, and furnish an abstract showing title to be in plaintiff as of March 1, 1936, with taxes for 1935 and prior years paid, and that upon failure of the plaintiff so to do, the decree quieted title in the defendant subject to the mortgage. The court further found that should the defendant not pay the $1,490.48 and execute said note and mortgage within 60 days, then the contract of purchase shall be null and void, title to the lands quieted in plaintiff, possession given and judgment for three years' rental at $800 per year less $500 was to be rendered to the plaintiff against the defendant accordingly. The court so decreed.

The trial court having denied the defendant recovery for damages to the orchard and loss of his alfalfa crop, and no cross-appeal being taken, those matters are referred to herein only in so far as they may explain the conduct of the defendant. The appeal presents the question: Is the plaintiff entitled to a rescission and cancelation of the contract, or is the defendant entitled to specific performance? If that question is resolved in favor of the defendant, then the next three questions presented are: (1) Is the defendant entitled to receive the premises with the 1935 general taxes paid? (2) Is the defendant entitled to credit for damages and depreciation to the buildings? (3) Is the defendant entitled to a credit for his payment of the water maintenance charges?

The record indicates a desire of the defendant at all times to complete the purchase of the property, and a willingness of the plaintiff to carry out the contract of sale, down to and including November 29, 1937. At that time, the plaintiff notified the defendant that it rescinded and canceled the contract because of the failure and refusal of the defendant to comply with the terms, conditions, and provisions of the contract. During the time that both parties were willing to perform the contract, the defendant was making claim for certain alleged unliquidated damages which he insisted should be adjusted and credited on the purchase price. He also demanded that the plaintiff pay the 1935 general taxes and water charges which had not been paid. There was an oral agreement that the time of settlement was extended to March 1, 1936. At the time of the tender made by the plaintiff in October, 1935, the 1934 taxes had not been paid. The demand of the plaintiff for the payment of the $1,500 plus the execution of notes and a mortgage for $8,000 before those taxes were paid was not justified. The plaintiff, while unwilling to grant the credits, did not until November 29, 1937, attempt to rescind and cancel the contract, and did not begin this action until February 8, 1938. While the demands of the defendant for credits were not justified, yet both parties considered the contract as in force and attempted to make settlement under it. Under the circumstances here existing, we will not disturb the decree of the trial court denying rescission to the plaintiff and decreeing specific performance of the contract.

It is axiomatic, however, that the contract to be performed must be the contract which the plaintiff and the defendant made. The contract calls for the defendant to assume and pay the 1935 general taxes. It was clearly within the contemplation of the parties that plaintiff might not be able to convey title and give possession on March 1, 1935. The defendant reserved the right to complete the contract if possession and title could be given within a reasonable time after March 1, 1935. Defendant, under the

contract, could elect to make settlement at a subsequent time, or he could elect to consider the contract null and void and secure a return of his "earnest money" with interest. However, the contract did not provide for the waiver of its terms with reference to the taxes if the contract was completed after March 1, 1935. The subsequent oral agreement to make settlement March 1, 1936, did not affect the defendant's contractual obligation to assume and pay the 1935 general taxes. The defendant, therefore, as a condition to specific performance, must comply with his contract to assume and pay the 1935 general taxes. It follows that the trial court erred in finding that the defendant was entitled to receive the property with the 1935 general taxes paid.

In the contract of purchase, the defendant assumed "full responsibility of the maintenance and upkeep of said premises, buildings and improvements" from March 1, 1935. Defendant by his answer alleges that the "contract and conditions thereof were deferred for one year and that the said plaintiff retained possession of said property until March 1, 1936, and assumed *the full responsibility* for the maintenance and upkeep of said premises, buildings and improvements during the year 1935 and until March 1, 1936."

From the testimony of the defendant himself, it is evident that the damages, if any, to the buildings occurred after March 1, 1936. The defendant also entered into possession of the premises as of that date, asserted rights of ownership, and has since maintained that possession and received the beneficial use of the premises. He asserted acts of ownership of the buildings by telling the occupants that he "wanted them to get out," and he made no effort to protect the buildings or prevent waste.

The defendant cannot accept the advantages of ownership without also accepting its responsibilities and liabilities, contractual and otherwise. The record discloses that before entering possession he had the abstract of title examined, and his acts thereafter indicate that he approved the title as to all matters except taxes.

Under the circumstances here existing, an equity court regards the defendant as the real owner subject to the claim of the plaintiff for the unpaid purchase price. The defendant as the owner of the premises must bear the loss, if any, that has occurred to the buildings. *McGinley v. Forrest*, 107 Neb. 309, 186 N. W. 74; 66 C. J. 1052; 14 Neb. Law Bulletin, 178. Independent of equitable rules, the defendant assumed that responsibility by his contract, and it attached as of a date, in any event, not later than March 1, 1936.

The trial court therefore erred in allowing the defendant a credit for damage to buildings.

We come next to the question of the deduction of the amount of the water charges. There is no reference in the contract to water charges or irrigation. The corporate capacity of the Cozad Ditch Company, to whom the payment was made, is not shown. So far as this record is concerned, it is a private corporation engaged in the business of selling water. There is in evidence a letter from the Cozad Ditch Company, indicating that it is the successor of the Cozad Irrigation Company, and that it "recognizes a water right on" the land involved in this controversy. The abstract, which is in evidence, shows a water-right deed executed by the Cozad Irrigation Company to one Robert Shields wherein the company sold Shields, his heirs and assigns the right to the use of water from the company's canal upon the land here in controversy; the grantee to pay an annual rental for the use of said water, payment to be a condition precedent to the delivery of water, and upon default in payment the company had the right to cease delivery until payments are made or declare the contract forfeited, and in the event the company declared a forfeiture, all "equitable and legal interests in the water rights" conveyed reinvested in the company.

Assignments of the rights conveyed were not to be binding on the company unless approved by them.

No evidence is cited showing either an assignment of this contract to the plaintiff or the approval of such an assign-

ment by the company. The water rights, obligations, and appropriations of the company are not shown.

Defendant in his answer alleges, and in his brief argues, that the contract for water was an appurtenance to the property which it was the duty of the plaintiff to convey to the defendant; that he had a right to the conveyance of that appurtenance free of the lien. The contract is silent, however, as to that matter. Elsewhere in his brief, defendant refers to these charges as an "equitable lien," and still later states that they "are a valid lien against this property." Certainly, these charges are not a valid lien unless made so either by statute or contract.

"In a number of the Western States it is provided by statute to the effect that the contract amount, or the amount that may be provided for in accordance with law, to be paid to water companies by the consumers furnished with water shall be a first lien upon the land for the irrigation of which the water is furnished and delivered. But whether this right is provided for by statute or not, we take it that a corporation has the power to make such a contract with its consumers, and that the lien so provided for may be enforced. * * * *But in order to create the lien on the land the language used in the contract must be definite and specific, and must be a direct declaration that such a lien is created by its terms.*" 3 Kinney, Irrigation and Water Rights (2d ed.) 2741, sec. 1522. See, also, 67 C. J. 1419.

The "water-right deed" does not purport to make the rental charges a lien upon the land. Collection is enforced by stopping delivery of water or a forfeiture of rights under the contract, and a loss of the consideration paid. The abstract does not carry the delinquent charges; apparently they do not appear upon any public record, and, obviously, they are paid direct to the company.

Defendant cites section 77-207, Comp. St. 1929, which is as follows: "All special assessments, regularly assessed and levied as provided by law, shall be a lien on the real estate on which assessed, but shall be subject to the general taxes mentioned in the last preceding section."

If these are such special assessments, then the defendant is obligated to pay them, for he agreed to pay "all other taxes (except general) and/or special assessments *now levied* or which hereinafter may be assessed or levied against said premises."

The burden of establishing a lien is upon the defendant. Under the facts as disclosed by this record, we are unable to determine that such a lien exists or that the plaintiff is liable to remove the same if it exists. The defendant has failed to sustain his burden of proof. The trial court erred therefore in allowing the defendant credit for the water charges paid.

The trial court erred in ordering the plaintiff to deliver a warranty deed. The deed should be in accord with the covenants of the contract. Likewise, the mortgage should conform to the contract. The defendant should also be required to insure the premises and otherwise perform the contract.

The decree of the district court is accordingly modified and remanded to the trial court with instructions to enter a decree conforming to this opinion, and in particular to provide that:

(1) The defendant shall pay the plaintiff the sum of $1,500 together with interest thereon from March 1, 1936, at 6 per cent. per annum.

(2) The defendant shall pay the plaintiff interest on the sum of $8,000 from March 1, 1936, at 5 per cent. per annum.

(3) All calculations of interest presently payable shall be made to the date of the payment thereof.

(4) The defendant shall pay all taxes accrued and owing for the year 1935 and years subsequent thereto.

(5) The defendant shall make, execute and deliver to the plaintiff notes for $8,000, due March 1, 1946, with interest payable annually at 5 per cent. per annum, and 2 per cent. of the principal sum of $8,000 payable annually beginning March 1, 1941, and shall make, execute, and deliver a mortgage to the plaintiff securing said indebted-

ness upon said premises, the terms of said notes and mortgage to be in conformity with the provisions of said contract.

(6) Denying to the defendant recovery of the sum of $800, or any other amount, for decrease in value of the premises resulting from loss of barn or damage to the house on said premises.

(7) Denying to the defendant recovery of the sum of $295.26, or any other sum, for water maintenance charges paid.

(8) The defendant shall insure the buildings and deliver said policies to the plaintiff as provided in the contract.

(9) All costs of this action are to be taxed to the defendant. Plaintiff's costs shall be paid by the defendant before the execution and delivery of the deed from the plaintiff to the defendant.

(10) The defendant shall fully comply with the provisions of said decree within 40 days from the issuance of the mandate herein.

(11) When the defendant shall have complied with the provisions of said decree and made said payments, then the plaintiff shall execute and deliver to the defendant a deed for said premises with covenants as provided in said contract.

(12) Should the defendant fail to comply with the provisions of said decree within the time set out herein, then and in that event, the contract of purchase shall be declared null and void, the title to said land quieted in the plaintiff, the plaintiff shall have and recover possession thereof, and at its request a writ of restitution shall issue, and the plaintiff be placed in possession, and the plaintiff shall have judgment against the defendant for the sum of $1,900 for the use and occupancy of said premises for the years 1936, 1937, and 1938, said sum being calculated at the rate of $800 per annum, and deducting therefrom the sum of $500 paid by the defendant to the plaintiff at the time said contract of purchase was executed.

AFFIRMED AS MODIFIED.

MARJORIE GLEASON, APPELLEE, V. HERBERT D. BAACK, APPELLANT.

289 N. W. 349

FILED DECEMBER 15, 1939. No. 30669.

1. **Automobiles.** Section 39-11,112, Comp. St. Supp. 1937, places a positive duty upon the driver of a motor truck or combination thereof, on bringing his vehicle to a stop upon or immediately adjacent to the traveled portion of a highway, at any time within a period of from one-half hour after sunset to one-half hour before sunrise, requiring the driver to immediately place flares, as provided in said section of the statute.
2. ———. The word "immediately," as used in section 39-11,112, Comp. St. Supp. 1937, means with reasonable and proper diligence, or promptly, and what would constitute immediately would depend upon all of the facts and circumstances proved. The term "immediately" should be reasonably construed in connection with the attendant circumstances.
3. ———. In applying the term "immediately," as contemplated by section 39-11,112, Comp. St. Supp. 1937, the evidence and the circumstances in the instant case require submission of the question to the jury.
4. ———. Section 39-1154, Comp. St. Supp. 1937, providing for the parking and leaving of vehicles, attended or unattended, upon improved main portions of the highway, under circumstances as set forth therein, places a positive duty upon the driver of such vehicle, and whether or not the vehicle could, or should, have been parked on the shoulder of the highway under the circumstances is a question for the jury.
5. ———. Section 39-1176, Comp. St. Supp. 1937, providing: "The head lamps of motor vehicles shall be so constructed, arranged, and adjusted that * * * (with certain exceptions) they will at all times mentioned * * * and under normal atmospheric conditions and on a level road produce a driving light sufficient to render clearly discernible a person two hundred feet ahead, but shall not project a glaring or dazzling light to persons in front of such head lamp," places a positive duty upon the driver of a motor vehicle.
6. ———. The violation of statutes regulating the use and operation of motor vehicles upon the highway is not negligence *per se*, but evidence of negligence that may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby.
7. ———: DUTY OF GUESTS. The duty of a guest riding in an

automobile is to use care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances. The guest is not required to use the same degree of care as devolves upon the driver. If the guest perceives danger, or if at certain times and places should anticipate danger, he should warn the driver. Ordinarily, the guest need not watch the road or advise the driver in the management of the car. The evidence and circumstances of the instant case are not such that the guest was in a position to anticipate or perceive danger sufficient to require the guest to warn the driver.

8. Witnesses. In an action to recover damages for personal injuries suffered in an automobile collision, where plaintiff's witness was cross-examined as to whether he had made statements in writing as to details of accident, there was no error in permitting plaintiff's counsel, on redirect, to inquire to whom the statement was made; nor was the answer that such statement was made to a "lawyer for the insurance company" ground for declaring a mistrial, where no element of bad faith is involved.

9. ———. When a party offers a witness, the relation of that witness to the thing in issue and his interest in the result become material as affecting his credibility.

APPEAL from the district court for Hall county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

Prince & Prince and *Chambers, Holland & Locke,* for appellant.

Joseph M. Emmert and *Cleary, Suhr & Davis, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, MESSMORE and JOHNSEN, JJ., and ELLIS, District Judge.

MESSMORE, J.

This is an action for personal injuries suffered by the plaintiff (appellee herein) in a collision upon the highway between the automobile in which she was riding and defendant's truck, which had temporarily stopped upon the highway. The cause was tried to a jury, and a verdict returned in favor of the plaintiff in the sum of $3,250. Motion for a new trial was overruled. Defendant appeals.

The record discloses the following facts: John Doherty,

the owner of a 1928 DeSoto coach automobile, was driving on the evening of November 28, 1937, from Greeley to Grand Island, Nebraska, accompanied by the plaintiff and four other companions. The party left Greeley at 7 o'clock. The plaintiff was returning to her duties at St. Francis Hospital in Grand Island. The radiator of the car leaked, and the driver had a can of water in the back of the car to replenish the radiator when needed. Between Greeley and St. Paul water was put into the radiator on two occasions. At St. Paul the party remained for an hour and a half to two hours at the Whale Café. After leaving St. Paul they delivered one member of the party at her home shortly before midnight, when plaintiff moved to the front seat of the car. The windshield was cleaned and water put in the radiator before the party entered highway No. 281. They proceeded south on the highway, an oil mat, 26 feet in width, with a white stripe down the center.

Floyd Hester, driving a G. M. C. truck, with an Omaha standard stock trailer attached, approached an intersection of highway No. 281 from the west. The width of the body of the trailer was 7 feet, 10 inches, and the height from the ground 11 feet. The trailer was loaded with 17 head of cattle, weighing 16,500 pounds, and the weight of the trailer was 13,800 pounds. The owner of the cattle, Henry Volke, was riding in the truck cab with the driver. Herbert D. Baack, the defendant, owner of the truck, and W. A. Munson were riding in an automobile following the truck. As the truck approached the intersection some of the cattle in the trailer were down, and the truck was stopped to rectify this condition. The truck was on an incline and was moved onto highway No. 281 about 100 feet south on said highway, where it was stopped temporarily on the west edge of the paving. There was a light at each corner of the truck, a cluster of three lights across the center, and a tail or stop light; in all, six lights, burning. When the truck stopped on the highway Munson remained in the car following the truck on the side road leading into the intersection. The highway at the point where the truck stopped was

level for a half-mile or more ahead, and for a quarter of a mile back, of the truck.

The DeSoto car proceeded south on highway No. 281 for a distance of about two miles, when the collision occurred, about 80 rods south of a filling station opposite St. Libory. The driver Doherty explains the accident, in substance, as follows: The DeSoto car was proceeding along the pavement on the right-hand side of the center thereof, going south, at a rate of speed of 30 miles an hour, and when within 10 or 15 feet of the truck, and just before the crash, the driver applied his four-wheel brakes, which were in good condition. A red light appeared all at once. There was no person signaling with a flashlight. The front part of the DeSoto car from the radiator back to the windshield went under the truck, took the top off the radiator and drove the hood of the engine back, breaking out the windshield and throwing the driver through the left front door. The driver stated that the night was very dark, bitter cold, and blustery, and the highway was dark. Other witnesses, including an expert, testified that the night was clear and stars were shining, and some of the witnesses for the plaintiff testified that there was frost in the air and it was foggy.

When the truck stopped on the highway the driver stepped out on the running board, looked back towards the north, and could see no cars. He went immediately to the back of the truck, found that some of the cattle were down and endeavored to get them up. When Volke, who had remained in the driver's seat, was getting out to go back to see what had happened, the crash occurred, he said, within two or three minutes altogether. Munson stated he saw the DeSoto car immediately at the time the truck stopped; he did not contemplate going onto the highway until the cattle were up; he blinked the lights on his car two or three times before the DeSoto car arrived at the point adjacent to the intersection. Defendant Baack stated that before the truck entered the highway he noticed that some cattle were down and concluded that there was no use try-

ing to get them up, because of the incline on the side road, so suggested to the driver to pull onto the highway, and as the driver got into the cab to comply defendant walked on the right-hand side of the truck, watching the driver maneuver to the place where he stopped the truck. After the truck stopped defendant walked to the rear end to examine the cattle, saw that two of them were down, and proceeded towards the front end of the cab to obtain flares.

With reference to the shoulder of the road, west of the edge of the oil mat, the road boss testified that the shoulder was between four and five feet in width, of clay soil, solid and rolled with a heavy roller. Volke testified that the shoulder did not appear to be solid. The defendant testified that he observed the shoulder of the road and considered that it was not packed well enough to carry the weight of the truck, and, further, that the truck was parked less than four inches from the west edge of the pavement; that is, the west edge of the truck wheels were four inches from the west edge of the pavement. Doherty stated that the truck was standing so that the inside edge of the box of the truck would be a distance of 12 inches, or thereabouts, from the white line. Leo Cordes, a witness for plaintiff, testified that he observed the truck on the right-hand side of the highway, facing south, and that all wheels were on the pavement. Sheriff Petersen testified that the shoulder of the road was a little sandy and did not look to be firmly packed.

There is evidence of a conversation between Doherty and defendant, wherein defendant said that he did not have the flares out; also that he went around the side of the truck next to the ditch, back of the DeSoto car, got the flares out and came back with them. The foregoing statement of the evidence brings us to a consideration of the following statutory provisions:

Section 39-11,112, Comp. St. Supp. 1937, provides in part: "The operator of a motor truck or combination thereof, * * * shall immediately upon bringing his vehicle to a stop upon or immediately adjacent to the traveled portion of

the highway at any time during the period of from one-half hour after sunset to one-half hour before sunrise, place one lighted flare at the side of such vehicle just inside the black line marking the center of paved highways and near the center of dirt or gravel highways, place one lighted flare approximately one hundred feet to the rear of such vehicle and place one lighted flare approximately one hundred feet to the front of such vehicle; and shall maintain such lighted flares in such position during the time said vehicle remains parked."

The court instructed "that the word 'immediately,' as used in the law requiring the flares to be placed, means with reasonable and proper diligence, or promptly, and what would constitute immediately would depend upon all of the facts and circumstances proved. The term 'immediately' should be reasonably construed in connection with the attendant circumstances."

Section 39-1154, Comp. St. Supp. 1937, provides in part: "No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off the paved or improved or main traveled portion of such highway; provided, in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of said highway opposite such standing vehicle shall be left for free passage of other vehicles thereon."

The foregoing provisions of the statute place positive duties upon the defendant and the driver of the truck. The trial court properly instructed the jury as to the duty required of the owner of the truck, or his driver, in placing flares and when they should be placed, and further instructed, as heretofore stated, as to the manner in which the term "immediately" should be construed. The evidence with reference to the shoulder of the highway west of the

line of the pavement, and as to whether or not the load in the truck could be supported by the shoulder, is in conflict. The facts thus being in controversy, the issues involved in this respect were questions for the jury's determination.

Section 39-1176, Comp. St. Supp. 1937, provides in part: "The head lamps of motor vehicles shall be so constructed, arranged, and adjusted that * * * (with certain exceptions) they will at all times mentioned * * * and under normal atmospheric conditions and on a level road produce a driving light sufficient to render clearly discernible a person two hundred feet ahead, but shall not project a glaring or dazzling light to persons in front of such head lamp."

The testimony with reference to the lights on the DeSoto car may be summarized in the following respects: The driver of the car could have avoided the accident if he had seen the truck within a radius of 50 to 75 feet of his lights. He could have avoided the accident had he seen the truck within a radius of 25 feet. He saw the truck when he was within 10 or 15 feet of it. The lights on the truck were burning, and the lights on the DeSoto car would penetrate so that a man could be seen within a radius of 30 feet in front of the lights. The last cited statutory provision and facts stated with reference thereto constitute the principal charge of negligence against the driver of the DeSoto car.

The cases of *Roth v. Blomquist,* 117 Neb. 444, 220 N. W. 572, *Most v. Cedar County,* 126 Neb. 54, 252 N. W. 465, and *LaFleur v. Poesch,* 126 Neb. 263, 252 N. W. 902, are cited on the principle that it is negligence as a matter of law for a motorist to drive a motor vehicle on a public highway at such a rate of speed that it cannot be stopped or turned aside in time to avoid an obstruction discernible within the range of his vision ahead. See, also, *Tomjack v. Chicago & N. W. R. Co.,* 116 Neb. 413, 217 N. W. 944.

In the instant case, the petition charged that the proximate cause of the collision was the carelessness and negligence of the defendant. The answer charged that the contributory negligence on the part of the plaintiff, combined with the negligence of the driver of the car in which she

was riding, was the proximate cause of the collision. And, in addition, the court instructed that, if the jury should find from the evidence that the defendant and the driver of the car in which plaintiff was riding as a guest were both negligent in a manner which contributed to plaintiff's injury and was the proximate cause of the injury, this fact would not defeat recovery. The foregoing cases would be pertinent to the issues in this case if the evidence did show that the negligence of the driver of the car in which plaintiff was riding was the proximate cause of her injury. The evidence does not disclose that this is the fact.

The law is well settled by the decisions of this court that a violation of statutes regulating the use and operation of motor vehicles upon the highway is not negligence *per se* but evidence of negligence that may be taken into consideration with all the other facts and circumstances, in determining whether or not negligence is established thereby.

It is the law of this state that in cases of this character negligence of the driver cannot be imputed to a guest in the automobile.

"A person riding in an automobile driven by another, even though generally not chargeable with the driver's negligence, is not absolved from all personal care for his own safety, but is under the duty of exercising reasonable care to avoid injury. The care exacted is that which an ordinarily prudent person would exercise under like circumstances." 5 Am. Jur. 769, sec. 475.

In the case of *Hendren v. Hill,* 131 Neb. 163, 267 N. W. 340, we find this statement (p. 167): "The qualification is that the same degree of care is not required of the guest as of the driver. If the guest perceives danger, or if at certain times or places he should anticipate danger, such as at railway crossings, he should warn the driver, but ordinarily he need not watch the road or advise the driver in the management of the car."

The plaintiff had a right to assume that the driver was a reasonably safe and careful driver. When a situation

arises which is out of the ordinary, the guest is under the duty to warn the driver of dangers which would be apparent to the guest. The windshield on the DeSoto car was cleaned and the radiator replenished with water just prior to the time the car entered on the pavement, going south, which was two miles north of the scene of the accident. The pavement was level; the driver had a clear vision ahead; the plaintiff was seated at the right of the driver, not paying particular attention to the road, had slumped in her seat and was a little drowsy, shortly before the crash. There was nothing said by any person in the car just prior to the crash. Under the circumstances, there was no apparent reason for plaintiff to anticipate or perceive danger of such a nature as would place the duty upon her to warn the driver.

We believe that the evidence was inadequate to submit to the jury, in any event, the question of contributory negligence on the part of this plaintiff, and the instructions given by the court in reference to comparative negligence as between the alleged contributory negligence of the plaintiff and the negligence of the defendant, even if erroneous, are not applicable to the situation and, therefore, not prejudicial to the defendant.

The defendant, at the conclusion of the trial, asked leave to amend the answer to show that the plaintiff negligently acquiesced in the driving of the DeSoto car without lawful lights thereon. The evidence fully covers this situation, as do the instructions of the trial court. There was no prejudicial error in the refusal of the court to allow the amendment.

The claim made by the defendant in relation to frost forming on the windshield of the DeSoto car, and steam coming from the top of the radiator and freezing on the windshield, as a ground of negligence, is not supported by the record, and the claim made by the plaintiff that three men were working behind the truck, obscuring the lights burning on the truck, is likewise not sustained by the evidence. The driver of the truck, however, was caught be-

tween the truck and the DeSoto car at the time of the crash.

The defendant predicates error upon the failure of the court to direct a mistrial when, on redirect examination, one of the witnesses for the plaintiff testified in reference to insurance. We deem it advisable to set out this testimony somewhat in detail. The cross-examination conducted by Mr. Prince, representing the defendant, is in part: "Q. About the first of December, 1937, didn't you talk to a man by the name of Blocke and sign a written statement? A. I don't remember the man's name. Q. Do you remember of signing it? A. Yes. Q. That was a day or two after the accident, second or third day? A. Are you referring to the lawyer? Q. The man who came out and had you sign this statement? A. Yes. Q. Calling your attention to exhibit one, is that your signature at the bottom of that writing? A. Yes. Q. Did you read it over at that time? A. Yes. Q. In that statement didn't you tell him it was a clear night? A. No; I didn't. Q. But you signed the statement; read the statement and see if that is not in that, the very last words, the line immediately above your signature? A. It was foggy." From this point the testimony continued as to whether or not witness had made contradictory statements in the trial of the case when he was being examined as to weather conditions on the night in question. On redirect examination of the witness by Mr. Davis, we find the following: "Q. Who was it that got you to sign a statement? A. A lawyer for the insurance company. Q. What was his name? By Mr. Prince: The defendant now moves that a mistrial be declared in this case and asks leave to withdraw the jury. The Court: Q. For what? By Mr. Prince: A. Misconduct of counsel and the answer that has been given. Court: Overruled. By Mr. Davis: Q. Did you tell him at the time you signed the statement that it was clear that night? A. I don't believe I did, I think I told him it was foggy. Q. In whose handwriting is that statement that was presented to you? Is it in your handwriting? A. No." Recross-examination by Mr. Prince: "Q. But

you did sign it? A. Yes. Q. And read it over before you signed it? A. Yes."

The rule in Nebraska, stated in *Fielding v. Publix Cars, Inc.*, 130 Neb. 576, 265 N. W. 726, is: "In an action against a taxicab company for injuries to a passenger, it is reversible error for the trial court to permit plaintiff on his case in chief to show that defendant is indemnified from loss by an insurance company, where such proffered evidence is not relevant to any material issue in the case;" revoking the rule of practice promulgated in *Jessup v. Davis*, 115 Neb. 1, 211 N. W. 190.

The injection of insurance into the instant case rests primarily upon the following question and answer on redirect examination by plaintiff's counsel: "Q. Who was it that got you to sign a statement? A. A lawyer for the insurance company."

In the case of *Moy Quon v. Furuya Co.*, 81 Wash. 526, 143 Pac. 99, the claim agent called on the injured man in the hospital, and propounded to him carefully written questions, and subsequently the claim agent was called for the purpose of discrediting the injured person's testimony. On cross-examination, it developed that this witness was a claim agent from the casualty company which carried appellant's liability insurance. The court referred to the general rule and made this statement: "This rule, however, was never intended to override the equally positive and salutary principle that a party has the right to cross-examine the witnesses produced by his adversary touching every relation tending to show their interest or bias. * * * When a party offers a witness, the relations of that witness to the thing in issue and his interest in the result become material as affecting his credibility. It is universally held that these things may be developed on cross-examination." They may be likewise developed on redirect examination when a statement is taken by a representative of the defendant and a witness interrogated in reference thereto by defendant's counsel.

In *Gianini v. Cerini*, 100 Wash. 687, 171 Pac. 1007, the

court said: "In the instant case, counsel for defendant having gone into the matter of the statement signed by plaintiff, it was entirely proper for the plaintiff to show on redirect all the circumstances under which the statement was made and to develop the entire conversation relating thereto. The evidence, therefore, was competent, and the mere fact that it may have been prejudicial did not render it inadmissible. If the effect was harmful, such was the defendants' misfortune, rather than the plaintiff's fault." See annotation, 56 A. L. R. 1439.

In *Treftz v. Kirby,* 146 Atl. 688 (7 N. J. Misc. 555) counsel, on redirect examination, inquired of a witness to whom his statement was made. The court held: "In action for automobile collision damages, where plaintiff's witness was cross-examined as to whether he had made statement in writing as to details of accident, there was no error in permitting plaintiff on redirect to inquire to whom statement was made, nor was the answer that such statement was made to insurance man any ground for declaring mistrial." See, also, *Webb v. Hoover-Guernsey Dairy Co.,* 138 Or. 24, 4 Pac. (2d) 631, wherein it was said: "When parties interested, either directly or indirectly, in the result of litigation, send their agents to interview witnesses and prepare statements for such witnesses to sign, the jury has not only the right to know who such agents are, but whom such agents represent, when a discrepancy arises between the testimony given by the witness on the stand and the statement prepared by such agent." This would be especially true when the statement is presented by counsel for defendant to a witness for the plaintiff and apparently for impeachment purposes. In the instant case the rule as announced in the preceding cases governs.

Reference is made to a scar received by the plaintiff while en route to trial in the instant case, assuming that she was endeavoring to recover for injuries sustained in another accident. This matter is fully explained in the evidence and is not prejudicial.

The injuries received by the plaintiff as the result of the

collision sustain the jury's verdict. Other assignments of error are without merit.

For the reasons given in this opinion, the verdict of the jury and the judgment of the trial court thereon are

AFFIRMED.

FRANK REITHMILLER ET AL., APPELLANTS, V. EDWARD CARR, ADMINISTRATOR DE BONIS NON, ET AL., APPELLEES.
289 N. W. 338

FILED DECEMBER 15, 1939. No. 30612.

1. **Charities.** A testamentary gift of a residuary estate to a church, "for the purpose of building the church, at this time partially built," and with authority in the executor "to turn over and deliver to the officers of said church said residue of my estate, when said church is fully finished and completed and not before," is a present gift of such residue, with the right of possession and enjoyment conditionally postponed, and is not violative of the rule against perpetuities.
2. ———. The failure of the church to complete the building for a period of nine years after the testator's death, under the circumstances and conditions set out in the opinion, did not constitute a renunciation or defeasance of the gift.

APPEAL from the district court for Lincoln county: J. LEONARD TEWELL, JUDGE. *Affirmed.*

Beeler, Crosby & Baskins and *Robert B. Crosby,* for appellants.

Hoagland, Carr & Hoagland, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

JOHNSEN, J.

The heirs at law of Warren B. Ellis, deceased, seek by this action to have it declared that the twenty-fifth paragraph of his will is violative of the rule against perpetuities, and that they are accordingly entitled to the residuary estate which it creates. They claim further that, if the

rule against perpetuities is not violated, they are still entitled to the residuary estate as a matter of renunciation or defeasance, because the beneficiary has failed to comply with the condition of the will within a reasonable time.

The principal defendants—and the only ones material so far as this appeal is concerned—are the residuary beneficiary under the will, and the administrator *de bonis non* of the estate. The trial court held that there was no violation of the rule against perpetuities, and that no renunciation or defeasance had yet occurred. Plaintiffs have appealed.

The twenty-fifth paragraph of the will is as follows: "All of the rest and residue of my property of every kind and description and wherever situated, I hereby give, devise and bequeath to the Christian Church of North Platte, Nebraska, for the purpose of building the church, at this time partially built, and hereby authorize my executor, hereinafter named, to turn over and deliver to the officers of said church said residue of my estate, when said church is fully finished and completed and not before. It being my express wish and desire that no moneys be paid over to said church until the church building is completed as aforesaid."

The testator died in 1928. His will was made in 1926. In 1925 the First Christian Church, of North Platte, Nebraska, of which he was both a member and an elder, had built the basement structure for a new brick church, at a cost of $13,000, which was used as an auxiliary of the old church, which it adjoined. The joists were laid for the main floor auditorium, and a temporary roof was placed over the structure. Ellis advocated the immediate completion of the building and stated that he would make a donation of at least $20,000. Plans were drawn for the finished structure, which was to cost approximately $40,000, and other subscriptions were solicited. Ellis then decided that the condition of his estate made it inadvisable for him to make an immediate cash gift, and he thereupon told the church that he would make provision for it in his will.

This made the other pledges uncollectible and completion of the building had to be deferred.

By 1931 administration of the testator's estate had been completed, except as to the residuary estate. While the will empowered and directed the executor to convert any real estate into money or interest-bearing securities, disposition of the real estate was not deemed advisable under the economic conditions which had set in following the testator's death. The marketability of the real estate contained in the residuary estate had been so affected by the depression, both national and sectional, that to have sold it would have meant an unjustifiable sacrifice. This economic situation still obtained when this action was instituted in 1937. In addition, the record indicates that the original executor had been guilty of mismanagement or misappropriation, which made it necessary for the present administrator *de bonis non* to institute litigation on his bond, and this litigagation was not completed until 1938, after the commencement of this suit. A claim against the trustee in bankruptcy of the trust company with which the executor had been connected and in whose affairs some of the assets of the residuary estate had seemingly become involved was shown to be still pending. At no time, therefore, since the testator's death had the assets of the residuary estate been available to aid in completing the church, as he had contemplated. The church was unable to raise sufficient outside funds for this purpose, and so the structure remained in the same condition as at the time of the testator's death.

It is plaintiffs' contention that the residuary clause was violative of the rule against perpetuities, because the completion of the church building was a condition precedent to the vesting of any rights on the part of the church in the property, and that, since such condition might not be performed within twenty-one years of lives in being, the gift was too remote.

If the completion of the church was a condition precedent to the gift—that is, if no rights in the residuary estate were vested in the beneficiary until the church was finished

—then plaintiffs' contention must be upheld. "If a gift is made to a charity on a contingent event and the happening of the event is a condition precedent to the gift, then, if the condition is too remote, * * * the gift to the charity is void." Gray, Rule Against Perpetuities (3d ed.) sec. 605. If, however, it was a present gift, and the rights in the residuary estate became vested immediately in the church, even though the time of its possession and enjoyment was postponed and made to depend upon a contingent and uncertain event, it would not violate the rule against perpetuities. 21 R. C. L. 310, sec. 38, and 315, sec. 45; 10 Am. Jur. 598, sec. 19.

In 2 Restatement, Trusts, sec. 401, comment k, it is said: "If property is given in trust for a charitable purpose * * * until the happening of an event which may not occur within the period of the rule against perpetuities, the intended charitable trust is valid if the happening of the event is not a condition precedent to the existence of the charitable trust, and if it does not appear that the settlor intended that no trust should arise unless the event should occur. In such a case the property is wholly devoted to charitable purposes from the outset. The court may permit the property to be held by the trustees to await the happening of the event."

Courts view with favor gifts for charitable purposes and will strain themselves to uphold such testamentary donations, if it can legitimately be done. *St. James Orphan Asylum v. Shelby,* 60 Neb. 796, 84 N. W. 273; *In re Estate of Secrest,* 109 Neb. 431, 191 N. W. 663. They will accordingly attempt to construe a gift in trust for charitable uses in such a way as to make it a vested interest, and not one subject to a condition precedent, where it is possible to do so. 48 C. J. 986.

The limitation in the residuary clause in this case is upon the turning over or delivery of the property, and not upon its vesting. It is a wholly reasonable construction, therefore, that the testator intended to make a present gift and to vest the church's rights as of the time of his death, even though the possession and enjoyment were condition-

ally and possibly indefinitely postponed. The residuary clause, accordingly, did not violate the rule against perpetuities.

It is plaintiffs' next contention that, if the gift did not violate the rule against perpetuities, there has since been a renunciation or defeasance of it by the failure of the church to complete the building within a reasonable time. Nine years had elapsed from the time of the testator's death to the institution of this suit. Six years had elapsed since the report of the executor showing that all expenses, claims and specific legacies had been paid. But, as has already been indicated, the residuary estate was at no time since the testator's death in such condition that it could have been used to help pay for the building, if the church had undertaken to complete it. A substantial portion of the assets had to be collected by the administrator *de bonis non* through litigation, which was not terminated until 1938. A claim in bankruptcy was still pending at the time of the trial in the district court. As to the real estate, no prudent business man would have sacrificed it on the existing market. In view of all these circumstances, it would be inequitable and, we believe, contrary to the testator's intention to hold that a renunciation or a defeasance had occurred because the building had not been completed at the time this suit was instituted. There is testimony to show that the church is now trying to work out arrangements to complete its building, but the significance and effect of this attempt are without importance here. We have no hesitancy, however, in holding that the situation which existed with respect to the residuary estate—not merely the litigation required for the recovery of part of the assets, but the impossibility of prudent sale and liquidation as to the real estate as well—and the general paralysis in developmental activity produced by economic conditions in the agricultural section of the country did not make the nine-year delay in completing the building an unreasonable one.

In *Allebach v. City of Friend,* 118 Neb. 781, 226 N. W. 440, where there was a testamentary gift for the erection

of a hospital, it was held that under the attendant circumstances in that case a four-year delay was not such an unreasonable length of time as to constitute a refusal to accept the gift. The court said: "This provision creates an estate upon a condition subsequent, and it is incumbent upon the donee to carry out the purposes of the bequest within a reasonable time. * * * What constitutes a reasonable time in giving effect to the express directions of the testator's will is determined from all the circumstances affecting and surrounding the gift."

It was defendants' contention that plaintiffs should have sought construction of the will in the first instance in the county court, and that the district court therefore was without jurisdiction, but this contention is sufficiently answered by *Merrill v. Pardun*, 125 Neb. 701, 251 N. W. 834, and the cases therein cited.

The decree of the trial court attempts to construe the status and relationship of the administrator *de bonis non* and the church with respect to the residuary property and its further administration, but since these questions are not necessary to a disposition of the issues raised between the plaintiffs and the defendants, we do not feel called upon —and we doubt if on this appeal we would have the right— to pass upon them. To dispose of the issues existing between plaintiffs and defendants, it is only necessary to determine the questions which we have discussed in this opinion, and to the extent of the trial court's determination of these matters, the decree is affirmed.

AFFIRMED.

KATHERINE M. VANDERLIPPE, EXECUTRIX, APPELLEE, V. MIDWEST STUDIOS, INC., ET AL., APPELLANTS.
289 N. W. 341

FILED DECEMBER 15, 1939. No. 30681.

1. **Automobiles.** A servant may on the same trip combine both his own and his master's business, and if one of the intended

results is to further the master's business, the master is liable.

2. **Master and Servant.** "In actions wherein it is sought to hold the master liable for the wrongful act of his servant, each case must be determined with a view to the surrounding facts and circumstances, the character of the employment and the nature of the wrongful act. Whether the act was or was not such as to be within the scope of his employment, in the execution of his master's business, is ordinarily one of fact for the determination of the jury." *LaFleur v. Poesch*, 126 Neb. 263, 252 N. W. 902.
3. ———. Where there is conflicting evidence and different inferences may properly be drawn therefrom, the question of whether a servant is acting within the scope of his employment is properly submitted to the jury for determination.
4. ———. Under the facts set out in the opinion, *held*, that the questions of negligence and contributory negligence and whether the deceased was guilty of such contributory negligence as would bar a right to recovery under the comparative negligence statute were issues properly submitted to the jury for their determination.
5. **Automobiles.** It is not essential to establish the negligence of a motorist that eyewitnesses of the accident be produced. Circumstantial evidence may constitute adequate proof of negligence.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed on condition.*

James J. Fitzgerald and *Wear, Boland & Nye*, for appellants.

Earl Hasselbalch and *Tunison & Joyner, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, MESSMORE and JOHNSEN, JJ., and KROGER and ELLIS, District Judges.

ELLIS, District Judge.

In this case the appellee, who was plaintiff in the court below, as the personal representative of the deceased, Benjamin R. Vanderlippe, sued on two counts to recover damages for alleged wrongful death. The first count was for damages recoverable under the statute for the benefit of the widow and next of kin, and the second count was for

damages for pain and suffering sustained by the deceased from the time of the injury until his death and for medical and burial expenses.

Upon trial the jury found against both defendants and fixed the amount of plaintiff's recovery on her first cause of action at the sum of $5,000 and on her second cause of action at the sum of $3,500. The defendants filed separate motions for new trial. Upon consideration thereof the trial court entered a conditional order overruling the motions, the condition being that plaintiff file a remittitur for $1,000 from the verdict and judgment. The plaintiff complied with the conditions and motions for new trial were overruled. The remittitur has been treated by the parties as applying to the recovery on the second cause of action. In her remittitur the plaintiff expressly reserved her rights under section 20-1929, Comp. St. 1929.

Both defendants have appealed and have filed separate briefs herein. The defendant Midwest Studios, Incorporated, a corporation, will hereinafter be referred to as "Midwest" and the defendant Fred Brinch as "Brinch."

The action arises out of an automobile collision which occurred in Boone county, Nebraska, on July 6, 1937, as a result of which plaintiff's deceased sustained injuries from which it is admitted he died on July 8, 1937.

In her petition plaintiff alleged that defendant Brinch was an agent and employee of defendant Midwest; that Midwest was the owner of the car being driven by Brinch at the time of the accident, and that it was then being used in the course of his employment; that the proximate cause of the accident and resulting injuries was the negligence of Brinch in operating said car, and specified as negligence (1) unlawful and negligent speed; (2) omission to sound horn; (3) failure to keep proper lookout and to have car under proper control; and (4) speed greater than proper and reasonable under the conditions.

By separate answer Midwest admitted Brinch was its employee, but denied that he was acting within the scope of his employment, and alleged that he was on a mission of

his own. It further denied negligence on its part and alleged that the proximate cause of the accident, resulting injuries and death was the negligence of plaintiff's deceased. The answer of Brinch was in effect the same as that of Midwest.

At the close of all the evidence Midwest moved for a directed verdict on the grounds (1) that the evidence affirmatively established that Brinch was not at the time and place of the accident engaged in the service or furtherance of the business of Midwest, but was on a mission entirely his own; and (2) that deceased was guilty of more than slight negligence. At the same time Brinch also moved for a directed verdict on the second ground assigned in Midwest's motion and for the further reason that plaintiff had failed to establish any act of negligence on his part.

Midwest assigns three errors in this court—the overruling of its motion on the ground first stated above; the overruling of its motion on second ground as stated above; and the overruling of the motion for new trial.

Brinch likewise assigns three errors in this court—separately assigning the overruling of his motion on two grounds stated therein and the overruling of his motion for new trial.

It thus appears that the defendants rely on substantially the same errors, except the assignment by Midwest that Brinch was not at the time acting within the scope of his employment, and we will discuss that assignment first.

Midwest is a corporation engaged in the portrait business. The business was obtained through salespeople or canvassers who obtained orders for portraits and frames and sent them in to the company where the work was done. At the head of the sales organization in the field there were division managers. Next under the division managers and subject to their directions came district managers and Brinch was one of these. Each district manager had under him several crews. A crew consisted of a varying number of people and was in general charge of a crew foreman. The foreman and crew members made the actual solicita-

tions of customers, although Brinch spent part of his time in the direct solicitation of customers and taking of orders. His time appears to have been divided between direct solicitation of orders and the supervision and stimulation of production of business by crews under him. He received a commission on the orders which he obtained as a result of his own solicitation and an "overwrite" or commission on all orders obtained by the individual members of the crews under him. As indicated above, both defendants admit by way of answer that Brinch was an employee of Midwest.

On July 6, 1937, Brinch was staying at a hotel in Central City. In the morning of that day he left Central City to go to Madison and it was while on this journey that the accident occurred. He testified that he had a portfolio with some samples and business papers in it, but that he did not take it with him on that morning. There is no testimony however that he had any need for the portfolio or its contents when not actually soliciting orders himself and when engaged in the other part of his work consisting of supervision and stimulation of the work of his crews. Brinch gave as his reason for making the trip to Madison, "I was going to join Bob Burke." Burke was a crew foreman under Brinch. Brinch had no appointment with Burke and his going was just his own idea. Brinch stated that the word "join" had no particular meaning. Burke was going to send his wife home and wanted to talk to Brinch about it. Brinch was going to discuss that with Burke that day. Burke's crew consisted of Burke, his wife and one man and they had been working in Madison for a week or two. After testifying as above, Brinch later in his examination denied that Burke's wife was a member of his crew. Burke wanted to send his wife home and wanted to borrow the needed money from Brinch. Brinch later on personally made the loan and Burke repaid it to him. Brinch admitted that as district manager he was interested in seeing that Burke kept at work and that Burke's wife was not much assistance to him in his work. "Q. And you thought that Burke would do better work if he did not have his wife around,

did you? * * * A. Well, I imagine so. She did need a vacation; traveling on the road does get on a lady's nerves. Q. And you thought that the quality of Burke's work could be improved if his wife could be sent away for a while, did you? * * * A. It might help. * * * Q. Whenever you saw a crew foreman, such as Bob Burke, you, of course, discussed business with him, didn't you? * * * A. Yes—well, every time we got together we discussed something about business, certainly." On the morning in question the crew which was with Brinch in Central City all went out to work before he left, and while Brinch took no orders that morning, he said he would have if some one had come up and given him one.

Midwest had legal title to the car Brinch was driving, but had sold it to Brinch on a conditional sales contract, which was unrecorded, so that, in so far as public records were concerned, Midwest was the owner. Brinch had made payment direct to Midwest on the purchase contract. "Q. As I take it, the sole purpose of the company in buying this car was to furnish Fred Brinch with a car so that he could work? I don't want you to misinterpret that. Put it this way; the sole purpose was for there to be a car available that he could have or could buy? A. That is correct. He wasn't in a financial position to purchase it, and without a car he couldn't operate, and, of course, the more business the field got, naturally the more business we would have to take care of. Q. So that you people bought him a car in order that he could continue to work? A. Well, not that exactly. We bought him this car, which was a new car. If he had gone—if he had got one, I knew he would have got an old rattle-trap that would have a lot of expense attached to it. He could have worked just the same without this car. Q. But you did buy it for him for the purpose of his working? A. That is correct."

Brinch reported the accident to Midwest by letter dated July 6, 1937. In it he stated, as on the witness-stand, that he was going "to join Bob Burke," but did not further amplify the purpose of his trip. He made no suggestion

that the trip was solely for personal reasons and said nothing to indicate that it was not in the course of and in connection with his work. He reported the damage to his car, estimated costs of repair at $100, transmitted offers by car dealers to exchange cars, and asked for instructions. Midwest sent Brinch a check for $100 to pay for repairs to his car and charged it to Brinch's division manager's account.

On this record Midwest insists that the question of whether Brinch was acting within the scope of his employment was one for the court, and that the trial court erred in not determining the question and determining it in favor of Midwest. This contention seems to be based on the assertion that there is no conflict in the testimony. With the latter assertion we are unable to agree. There is the conflict arising from Brinch's own testimony as to whether Mrs. Burke was or was not a member of Burke's crew. The triers of fact could choose between his conflicting statements. If she was a member of the crew, then certainly it would be a proper inference that her going directly affected the business of the Midwest. If she was not a member of the crew, there were the alternative inferences, either that her going was a private matter not affecting Midwest's business or that if she was sent away it might enable Burke to do better work. While Brinch patently sought to establish that the trip was for purely personal reasons, he admitted that when he got with a crew foreman they discussed business.

In *Harrell v. People's City Mission Home*, 131 Neb. 138, 267 N. W. 344, the court said: "A servant may on the same trip combine both his own and his master's business," and cited *Lytle v. Union Gas & Electric Co.*, 24 Ohio App. 314, 157 N. E. 804, and *McCormack Bros. Motor Car Co. v. Holland*, 218 Ala. 200, 118 So. 387. In *Primos v. Gulfport Laundry & Cleaning Co.*, 157 Miss. 770, 128 So. 507, it was held that an employee was acting within the scope of his employment where he was using his employer's truck partly for his own pleasure to attend a dance with his wife

and partly for his employer's benefit by soliciting business while at the dance.

The instant case is not like those of *Harrell v. People's City Mission Home, supra,* the companion case of *Parker v. Harrell,* 131 Neb. 147, 267 N. W. 348, and *Wise v. Grainger Bros. Co.,* 124 Neb. 391, 246 N. W. 733 (all cited by Midwest), in all of which cases the evidence was undisputed and without conflict that the employee was engaged solely on his own business. There was no evidence from which any contrary inference could properly be drawn. In such cases it goes without saying that the trial court, not only is justified, but should say as a matter of law that the employer is not liable.

Midwest cites the following rule and comment from 1 Restatement, Agency, sec. 235: "An act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of *or incident to* a service on account of which he is employed." (Italics ours.) "Comment: a. The rule stated in this section applies, although the servant would be authorized to do the very act done if it were done for the purpose of serving the master, and although outwardly the act appears to be done on the master's account. It is the state of the servant's mind which is material. Its external manifestations are important only as evidence. *The act is within the scope of employment only if the servant is actuated to some extent by an intent to serve his master.* However, it is only from the manifestations of the servant and the circumstances that, ordinarily, his intent can be determined. *If, therefore, the servant* does the very act directed, or *does the kind of act which he is authorized* to perform within working hours and at an authorized place, *there is an inference* that *he is acting within the scope of his employment.*" (Italics ours.)

We think the rule is sound and applicable, but that it does not support appellants' contention. We cannot say, as a matter of law, that Brinch's trip was not incident to the service on account of which he was employed. Neither can we say that he was not actuated at least to some extent

by an intent to serve his master. It certainly does no violence to logic to conclude from the record that, if Brinch had no other purpose in making the trip than personally to discuss with Burke the matter of his wife's trip, he was influenced to do this for the broad purpose and with the intention of promoting and furthering the interests of his employer. His own testimony directly supports such an inference. We are unable to say that different minds might not properly draw different conclusions from the evidence and we certainly cannot say that the jury's determination against Midwest was without foundation in the evidence.

In the case of *LeFleur v. Poesch*, 126 Neb. 263, 252 N. W. 902, this court cited with approval as a general rule of law applicable in cases like this the rule stated in *Stone v. Hills*, 45 Conn. 44, 29 Am. Rep. 635, which is as follows: "For all acts done by a servant in obedience to the express orders or directions of the master, *or in the execution of the master's business*, within the scope of his employment, and for acts *in any sense warranted* by the express or *implied* authority conferred upon him, considering the nature of the services required, the instructions given, and the circumstances under which the act is done, the master is responsible; for acts which are not within these conditions the servant alone is responsible." (Italics ours.) The rule applies in this case, and what this court said immediately following the citation of the rule is controlling in the instant case: "Whether the act was done in the execution of the master's business, within the scope of his employment, is a question of fact. The rule cannot aid in the determination of the fact. Each case must be determined with a view to the surrounding facts and circumstances, the character of the employment and the nature of the wrongful act. Whether the act was or was not such as to be within the scope of his employment is, ordinarily, one of fact for the determination of the jury."

We now turn to the contention of both defendants that the deceased was guilty of more than slight negligence as a matter of law and that the trial court erred in not sus-

taining defendants' motions for a directed verdict on that ground. In considering this assignment it is necessary to set forth the substance of the evidence bearing on the collision. The accident occurred in the approximate center of the intersection of highways Nos. 14 and 56. No. 14 runs north and south and No. 56 runs east and west. The deceased was proceeding west on No. 56 and at the point of collision the left wheels of his car were approximately on the center line of the roadway. Brinch was proceeding north on No. 14 and the left wheels of his car were approximately on the center line of the roadway. It thus appears that each driver was on his own side of the road. The roads as they approached the intersection were of normal width (approximately 22 feet), but all four corners of the intersection had been cut back or rounded off so that the area of the intersection was substantially greater than the square of the width of the highways. On the southeast corner of this intersection there was a bank higher than a car. This bank had the equal effect of obscuring the view of the deceased to the south and the view of Brinch to the east, as each driver approached the intersection. No. 56 as it approaches the intersection from the east is upgrade. It levels off in the intersection, then is downgrade to the west. No. 14 from the south is upgrade until a point about 75 to 100 feet south of the intersection is reached, when the traveler comes over a "kind of a crown of the hill." Another witness stated it was 325 to 350 feet from the crest of the hill to the center of the intersection. Still another witness placed the top of the hill as 250 feet south of the center of the intersection. On approach to the intersection on No. 14 from the south there are several highway signs, first, a "slow" sign, then a "state highway 200 ft." sign, then two signs with highway numbers and directional arrows on them, and then one indicating towns, directions and distances, the latter being nearest the intersection. The same number and kind of signs are located on No. 56 as it approaches the intersection from the east. Approaching the intersection from the east on No. 56 one

could not see the crest of the hill to the south on No. 14 until within 30 to 35 feet of the center of the intersection. From a point 25 feet south of the center of the intersection one could see east on No. 56 a quarter of a mile. From a point 50 feet south of the center of the intersection one could see east on No. 56 to the 200 foot highway sign. From a point 250 feet south of the center of the intersection one could see east on No. 56 60 to 70 feet from the center of the intersection. Cars coming from the north are not required to come into this intersection in order to proceed west, but about 150 feet north of this intersection a road branches off to the west and south and in a sweeping curve connects with No. 56 to the west of the intersection formed by the right angle crossing of Nos. 56 and 14. The curved road forms one leg of a Y to the north and west of the intersection. The space in between the right angle formed by the crossing of Nos. 56 and 14 and the curved road is referred to by the witnesses as an island.

The car that the deceased was driving was struck approximately in its center on the left side. The damage to Brinch's car was largely confined to its front end. After the collision the Vanderlippe car moved in a northwesterly direction about 60 feet and came to rest on its left side in the island above referred to and 10 to 12 feet off the gravel. The rear end of Brinch's car turned to the east and after being turned around one or more times came to rest headed south in the ditch on the west side of No. 14, 80 to 90 feet north of the intersection. There were no tire marks of the Vanderlippe car east from the point of impact. There were tire marks made by Brinch's car and they extended from about the center of the intersection south 12 to 14 feet to about the south edge of the intersection.

The accident occurred about 10:30 in the morning on a "nice, clear summer day." The witness McClung was riding with the deceased and had a case pending as a result of the same accident. He testified that as they approached the intersection the deceased slowed down and came practically

to a stop—down to 5 miles an hour; that you could not see to the south until you approximately reached the circle or widening of the intersection resulting from rounding the corners. McClung looked to the north and saw a car just starting to turn off to the southwest on the Y above referred to. He looked to the south, estimated that he could see about 250 feet to the top of the hill and saw no car. After slowing down, as above stated, deceased proceeded across, gaining a little speed ("probably to 10 miles an hour") in the few feet before the car was struck. When they reached a point a little past the center of the intersection, witness glanced to the south and saw a car right on them—maybe ten feet away. The crash followed immediately. He was rendered unconscious for a time by the force of the collision. He testified that the brakes on the Vanderlippe car were working all right. He thought that at 5 miles an hour the car could be stopped almost immediately—within a foot or two.

Brinch testified that, when he reached the sign showing towns, directions and distances, he stopped to ascertain the closest way to Madison and estimated this sign as 100 feet or so south of the intersection. He then put his car in low gear, shifted to second, then to high and started downhill. No car was coming from the west, but he could not see to the right or east. He took his foot off the accelerator and kept looking until he could see around the bank on his right. He was two to four feet from the edge of the intersection when he first could see to the east. At this point he saw a cloud of dust and a car 50 feet east of the east line of the intersection. He kept looking at the car and also put on his brakes as hard as he could. He had driven three to four hundred thousand miles and estimated the speed of the other car at 50 miles an hour, at least. This speed was not reduced up to the time of the collision. Just before the impact he saw the driver of the other car talking to the man beside him; that is, he saw him turn his head toward his companion. He estimated his speed, when he entered the intersection, at 15 miles an hour and at the

time of the impact at 5 to 7 miles an hour. His brakes were good. He thought that at 15 miles an hour he could stop within 12 to 15 feet. There was some conflict between statements in his letter reporting the accident to Midwest and his cross-examination on the stand as to whether the Vanderlippe car moved straight west up to the time of impact or swerved to the north just before the impact. His final position seems to have been that it turned to the north somewhat.

The witness Closson was coming south on No. 14 on his way to Cedar Rapids, which is west of the intersection in question. Instead of coming south to the intersection, he turned off to the west on the cut-off or Y above referred to. He estimated the cut-off started at a point 200 feet north of the intersection and that the curve was 100 yards, more or less, from where it turned from No. 14 to where it joined No. 56. Just before turning he was looking to the south and could see to the top of the hill south of the intersection. He saw no car coming from the south, but did see a car headed west on No. 56 not to exceed 50 feet east of the center of the intersection. He could not say whether it had "clearly stopped or was just moving * * * but it was not moving at a rapid rate." He moved around the curve at 15 to 20 miles an hour and after traversing the curve as he headed west he heard a crash and in his rear-view mirror saw a big cloud of dust. He drove on possibly 200 yards, turned around and came back to the intersection, where he saw the results of the collision. He did not see any other car in the vicinity of the intersection before the collision, and the evidence clearly indicates he could see all of No. 56 west of the intersection to the point where he entered it to the west of the intersection.

The actual conflict between the testimony of the witnesses McClung and Brinch is apparent. We think the innumerable conflicting inferences which different minds might properly draw from the testimony and the physical facts are likewise apparent. These conflicts could only be resolved by a determination of credibility and the corroborative influence

of all the facts and circumstances proved. The testimony of Closson certainly tends to corroborate the testimony of McClung. If Closson, who had a perfect view to the south on No. 14, did not see the Brinch car, it was not within the view of the deceased. Closson's testimony corroborates McClung's testimony as to the slowing down of the Vanderlippe car before entering the intersection and flatly contradicts Brinch's estimate that its speed was at least 50 miles an hour. If Brinch's car was not in sight when the Vanderlippe car reached the intersection, its driver had a right to proceed on through the intersection. There is no denial in the evidence that it had reached the center of the intersection at the time of the collision. That it was farther through the intersection than the Brinch car is clearly established by all the witnesses as well as the point of impact of the Brinch car against it.

There would be no point in further discussion of the conflicts in the testimony and conflicting inferences arising from it. Suffice it to say, we conclude that determination of responsibility for the accident was for the jury, and that the evidence did not justify the trial court in saying as a matter of law that the negligence, if any, of the deceased was more than slight.

The defendants rely on the decisions of this court in *Nelson v. Plautz,* 130 Neb. 641, 265 N. W. 885, *Ritter v. Hering,* 135 Neb. 1, 280 N. W. 231, and *Bergendahl v. Rabeler,* 133 Neb. 699, 276 N. W. 673. All these cases turned on the facts, and in each this court determined that the plaintiffs either did not look or that, notwithstanding claims of looking, the driver failed to see what was in plain sight. The essence of the rule developed by these cases was the failure to look (or to see what was in sight) where looking would have been effective.

The contention of the defendants necessarily involves the contention that the facts in the cases last above cited were similar to the facts in the case at bar. We think the evidence amply supports a finding in conflict with defendant's contention. In the cases cited the physical facts of

the grades of intersecting roadways compelled the conclusion that the drivers did not look or did not see where looking and seeing would have been effective. In the instant case the hill crest south of the intersection beyond which a car coming from the south could not be seen is a physical fact clearly distinguishing this case from those cited. The question of whether a driver looks, obviously, only becomes of controlling importance where looking would be effective. By this statement we do not wish to be understood as suggesting that there are ever any circumstances where a motorist is justified in not maintaining a constant lookout in all directions from which danger may come. We simply mean that if the Brinch car was not over the crest of the hill and in sight when the Vanderlippe car approached the east line of the intersection, as both McClung and Closson testified, then the absence of direct testimony that the deceased looked to the south is not controlling. Paragraph 3 of the syllabus in the *Bergendahl* case, *supra*, imposes the duty to see what is in plain sight *unless some reasonable excuse for not seeing is shown.* The hill crest in the instant case is within the exception. If no car was visible in the space south to the hill crest, when the Vanderlippe car approached the edge of the intersection, it had a right to proceed. Any other rule would render No. 56 from the east useless for travel. The Vanderlippe car had the right of way over traffic from the south and had the right to assume that motorists from that direction approaching an intersection, which was a blind one to them, would approach with their cars under such control that they could yield that right of way. We cannot escape the conclusion that the jury were justified in finding that Brinch did not heed the slow and intersection warning signs and his inability to see the intersection which the sign warned was within 200 feet and came over the crest of the hill at too great a speed. On the facts we conclude that the cases cited are not controlling and that the assignment last discussed is not well taken.

What precedes disposes of all assignments of error made

and discussed by Midwest and all assignments made by Brinch except the general one that the trial court erred in overruling his motion for a new trial. Under the rules of this court respecting assignments of error relied on, we are not required to consider the remaining contentions of error made by the appellant Brinch *only* by way of argument. See *Kuhlman v. Schacht,* 130 Neb. 511, 265 N. W. 549; *Currier v. Teske,* 98 Neb. 660, 154 N. W. 234. However, we will discuss them briefly. Appellant Brinch complains that the trial court erred in submitting to the jury the issue of excessive speed on his part. This contention is based on the fact that no witness other than Brinch himself testified directly as to the speed of his car. This position necessarily involves the contention that speed cannot be proved except by direct testimony. With this contention we cannot agree. "It is not essential to establish the negligence of a motorist, who has injured a traveler in the operation of his machine, that eyewitnesses of the accident be produced. Circumstantial evidence may constitute adequate proof of negligence." 10 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. ed.) 152, sec. 6555. No further citation of authority is required to support our conclusion that speed, like any other act of negligence, may be proved by circumstances, the conclusions to be drawn from the circumstances being for the jury. The appellant Brinch cites *Knoche v. Pease Grain & Seed Co.,* 134 Neb. 130, 277 N. W. 798. The reversible error in that case resulted from the admission of the opinion as to speed of a motor vehicle of a witness who did not see the vehicle before the collision and who had no reasonable time, means, distance or opportunity from which to formulate an opinion as to speed. In that case it was contended that what the witness saw after the collision was sufficient to provide the foundation for his opinion as to speed. This court said: "Testimony based on these facts would be a mere conclusion of fact and *an attempt to impinge upon the province of the jury.*" (Italics ours.) The opinion specifically holds "that this evidence was prejudicial to the rights of the defendant and constituted

reversible error." We do not find anything in the opinion holding that the issue of speed was improperly submitted in that case. Appellant Brinch cites paragraph 3 of the syllabus from this case, which is as follows: "'Where a question of fact that is material to the case is submitted to the jury by the trial court, upon which there is no evidence to support a finding, it constitutes prejudicial error.' *Roseland v. Chicago, M., St. P. & P. R. Co.*, 130 Neb. 637, 265 N. W. 882." This paragraph of the syllabus was not prompted by the discussion on the issue of speed but referred only to the issue of defective brakes, on which point there was no evidence. The case is not authority against proof of speed by circumstantial evidence. The trial court did not err in the instant case in submitting the issue of the speed of the Brinch car to the jury.

Brinch complains that the court's instructions gave undue emphasis by way of repetition to the issue of Brinch's speed, and that prejudicial confusion resulted from giving two instructions the same number, which instruction number was referred to in a preceding instruction. The transcript before us does not exactly reflect the situation as described by appellant. In any event, we have examined the instructions complained of and conclude that there was neither prejudicial repetition nor confusion.

Brinch further complains of inflammatory and prejudicial statements by counsel for plaintiff in their arguments to the jury. Without extending this opinion by setting forth the statements complained of, we have no hesitancy in saying that the statements complained of were improper and ought not to have been made. Generally, such conduct on the part of counsel has but one rational effect, and that is to impeach counsel's faith in his own client's cause. If courts would inexorably give that effect to it, the result might be to develop uniform strength sufficient to resist a temptation unworthy of the profession. In the instant case the court was called, the statements read to him, and counsel for defendants asked the court to instruct the jury to disergard them. There were three such interruptions, and on each

occasion counsel for defendants only asked that the jury be instructed to disregard the remarks and for admonition of opposing counsel. No request that the court declare a mistrial was made. In each instance the court properly instructed the jury. From consideration of the whole matter, as reflected by the record before us, we conclude that it does not justify reversal.

Both Brinch and appellee complain of the remittitur required by the trial court. Appellee contends that no remittitur should have been required. Brinch contends the verdict on the second cause of action was grossly excessive and the result of passion and prejudice. He further contends that the remainder is still grossly excessive. A verdict which is deemed to have been the result of passion or prejudice cannot be purged of the inherent and fatal quality by remittitur. See *Collins v. Hughes & Riddle*, 134 Neb. 380, 278 N. W. 888. The verdict on the first cause of action was not in any sense excessive and could not possibly be ascribed to passion or prejudice. On the record, the verdict on the second cause of action is obviously disproportionate to the verdict on the first. We conclude that the verdict in question was not so grossly excessive as to indicate passion or prejudice. We approve the trial court's action in requiring a remittitur, but question the amount of the remainder. There is no question but what deceased sustained multiple injuries and suffered intense pain. He lived approximately 42 hours after the accident. He was given some, although not complete, relief by the use of morphine. He was not mentally clear at least two-thirds of the time. Damages for pain and suffering are not allowable during the time that the injured person is unconscious. See *Fries v. Chicago, R. I. & P. R. Co.*, 159 Minn. 328, 198 N. W. 998; *Stone v. Sinclair Refining Co.*, 229 Mich. 103, 200 N. W. 948. Allowance can only be made for pain and suffering of which the injured person is conscious. The only evidence of specific damage under this cause of action was burial and medical expenses in the amount of $650. After the remittitur and deduction of expenses proved, the

allowance for pain and suffering is $1,850. Considering all the factors involved, we are of the opinion that this is still excessive and that justice will be subserved by requiring a further remittitur of $500. The gross judgment of $7,500 will be affirmed to the extent of $7,000 if a remittitur of $500 (in addition to that filed in the district court) is filed herein within 30 days from the releasing of this opinion. Otherwise the judgment will be reversed and the cause remanded for further proceedings.

AFFIRMED ON CONDITION.

IN RE ESTATE OF PETER E. WANTZ.
GEORGE W. CHAPPELL ET AL., EXECUTORS, APPELLEES, V. LEROY E. WANTZ, APPELLANT.
289 N. W. 363

FILED DECEMBER 15, 1939. No. 30693.

1. Wills. The intention of the testator as ascertained from the will must be given effect, if not prohibited by law.
2. ———. When apparent from the terms of the will that proper debts of a beneficiary are to be deducted from his legacy, such intent governs.
3. ———. Proper parol evidence, including evidence of testator's conduct subsequent to execution of will, and entries properly identified in an account book and other memorandum showing amounts paid, are admissible in proof of ademption of a legacy.
4. ———. Where the evidence is such as to show an intention of the testator to adeem or satisfy a legacy by gift or other payment of money subsequent to the execution of the will, such intention is controlling, and the burden of disproving such intention is on the party denying it.

APPEAL from the district court for Brown county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

G. A. Farman, Jr., and *J. J. Harrington*, for appellant.

William M. Ely, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and FALLOON, District Judge.

FALLOON, District Judge.

This is an appeal from the lower court involving the construction of the will of Peter E. Wantz, which will was admitted to probate in the county court of Brown county on May 24, 1938. It more particularly concerns payments made by the testator on certain obligations or debts of Leroy E. Wantz, a son and legatee of the deceased. The district court found $16,495.83 as the amount to be considered by the executors as having been so paid. Leroy E. Wantz has appealed.

The will was jointly executed by Peter E. Wantz and his wife, Adda Wantz, on November 25, 1931. The wife died first and it was admitted to probate first as her will and subsequently probated as the will of Peter E. Wantz. It provided for certain cash bequests to a half-sister of the wife and to the Congregational Church of Ainsworth, and the residue of the one who died first went to the survivor and then after the death of the survivor was bequeathed to certain children and grandchildren of the wife. As to those provisions of distribution there is no dispute except as it involves the share of the appellant.

The will also contained the following provisions:

"Whereas, Leroy E. Wantz, a son of said Peter E. Wantz, is indebted to said Peter E. Wantz for moneys advanced at various times for the payment of notes signed by said Peter E. Wantz jointly with and as surety for said Leroy E. Wantz, and said Peter E. Wantz is still liable on other notes executed by him jointly with and as surety for said Leroy E. Wantz, and it is the desire of these testators that all moneys, already paid, and which will hereafter be paid by said Peter E. Wantz before his death, or out of his estate after his death, on any notes signed by him jointly with and as surety for said Leroy E. Wantz, and which have not been repaid by said Leroy E. Wantz, shall be considered as advancements to said Leroy E. Wantz out of the estates of these testators and be deducted from the share he would otherwise receive;

"(All such notes so paid by said Peter E. Wantz in his

lifetime will be found in the possession of Wm. M. Ely, Attorney at Law, at Ainsworth, Nebraska, together with a true and correct account of the dates and amounts of the payments made thereon by said Peter E. Wantz, as well as a true and correct account of any payments that shall have been made by said Leroy E. Wantz to said Peter E. Wantz to apply thereon, and the production by said Wm. M. Ely of such notes and account into this court, supported by his sworn testimony that they are the notes and items given to him by said Peter E. Wantz as representing the indebtedness owing by said Leroy E. Wantz to said Peter E. Wantz, shall be accepted as conclusive evidence of the truth of the items of such account and of the amount of indebtedness owing by said Leroy E. Wantz to said Peter E. Wantz for money advanced prior to the latter's death)"

"V"

"Upon the death of the survivor of us, the entire estate of which such survivor shall die seized, real, personal and mixed, shall be converted into cash by our executor or executors as soon as conveniently may be, and, after the payment of all debts, legal charges and expenses of administration, shall be distributed and divided as follows, to wit:

"1. The First Ten Thousand Dollars ($10,000) shall go to William Soper, son of said Adda Wantz;

"2. The next Twenty Thousand Dollars ($20,000) shall go one-half to Verna McGachle, daughter of said Peter E. Wantz, and one-half to the heirs at law of Viva Arnold, a deceased daughter of said Adda Wantz, by right of representation;

"3. The residue shall be divided one-fourth to William Soper, one-fourth to Verna McGachle, one-fourth to Edna Soper, and one-fourth to the heirs at law of Viva Arnold, deceased, by right of representation, until the total amount received by each, including the advancement to Cecil Soper and the amounts mentioned in the two preceding subdivisions 1 and 2, equals the amount of Leroy E. Wantz's advancement, after which the remainder shall be divided one-fifth to William Soper, one-fifth to Verna McGachle,

one-fifth to Edna Soper, one-fifth to Leroy E. Wantz, and one-fifth to the heirs at law of Viva Arnold, deceased, by right of representation;

"And in the event that said Verna McGachle is not living at the time of the death of the survivor of us, then her bequest shall lapse and become a part of the residuary estate, but in the event that any of the other legatees are not living at the time of the death of the survivor of us, then the share of such deceased legatees shall go to his or her issue or next of kin, by right of representation.

"In making this distribution we are endeavoring to divide all of our property which remains after the death of both of us equally among our children, except that we desire William Soper to have the first Ten Thousand Dollars ($10,000) even though the others shall not receive that much, and it is our intention that the advancement previously made to Cecil Soper and Leroy E. Wantz shall be applied toward the satisfaction of their equal shares in our estates."

The appellee executors asked for construction of the will and the amounts considered advanced, to which the appellant joined, but pleaded the statute of limitations and asked that none of the items set forth in the petition be deducted from his share in the distribution.

How did the testator intend to distribute his estate? Courts if possible must arrive at his true intention. That has been pointed out so many times by this court that citations of authorities are unnecessary. The will provided specifically how the indebtedness of Leroy E. Wantz should be determined.

The testimony shows that, about the time of the execution of the will, an account book was given by the testator, Peter E. Wantz, to his attorney, William M. Ely, in which he was to enter certain items as reported to him by said testator from time to time in regard to certain debts paid for his son, Leroy. The will has directed the method and the evidence afforded by the account book and other memorandum was properly admitted to determine the intention

of the deceased. When such intention has been shown, the burden of disproving such is on the person denying the same.

It is true, as has been pointed out in the case of *Stanton v. Stanton*, 134 Neb. 660, 279 N. W. 336, that the doctrine of advancements in this state only applies to intestate estates. That case concerned testacy and this court rightfully refused to read into the will an effect that the testator never intended. Likewise, directions by the testator as to the deductions from certain legacies of proper debts will be enforced precisely as an estate will permit.

The terms used by the testator are immaterial except they point to his obvious intention. In this case the testator intended that the Leroy E. Wantz debts paid by him should be applied on or deducted from his otherwise equal share. Whether the language used was scholarly or not makes no difference, if the manifest meaning or intent can be ascertained. If there be no legal objection, "a man may do what he will, with his own."

"While the term 'advancements' is generally used in case of intestacy, it is also applicable to wills; and, when testator's intention is clear that sums advanced should be deducted from bequests made, his intention must control." *In re Bresler's Estate*, 119 N. W. 1104 (155 Mich. 567).

This intention to adeem a legacy may be shown by parol evidence, including that of the testator's conduct subsequent to the execution of the will, and entries made in an account book and other memorandum properly identified, showing the amount of such payments, are admissible as proof of such satisfaction or ademption. When the evidence shows such an intention on the part of the testator to adeem or satisfy a legacy subsequent to the execution of the will, such intention is controlling, and the burden of disproving such intention is on the party denying it.

"Where the circumstances are such that an intention of the testator to adeem a legacy is presumed, the presumption is one of fact and not of law, and so may be rebutted, but the burden of doing so is on those seeking to rebut it; and

the rebuttal evidence must be clear and satisfactory, particularly where the will contains language tending to confirm the presumption." 69 C. J. 1026.

The terms of the will are clear. The will says that the shares of Cecil Soper and Leroy E. Wantz should be charged certain amounts that they had received. The amount charged against Cecil Soper was definitely fixed at $10,000 and there is no controversy as to his share. The amount as to Leroy E. Wantz was to be determined as provided in the will on such notes paid by the testator in his lifetime to be found in possession of his lawyer, William M. Ely, and on "the production by said Wm. M. Ely of such notes and account into court, supported by his sworn testimony that they are the notes and items given to him by said Peter E. Wantz as representing the indebtedness owing by said Leroy E. Wantz to said Peter E. Wantz, shall be accepted as conclusive evidence of the truth of the items of such account and of the amount of indebtedness owing by said Leroy E. Wantz to said Peter E. Wantz for money advanced prior to the latter's death."

When there is a direction in the will as to deduction for debts of a beneficiary from his legacy, it will be enforced even though barred by the statute of limitations. The testator has control over his property, and the courts, unless prohibited by law, must carry out his intention as expressed by his last will and testament. The language used clearly denotes the intention of the testator to treat the payments, which he had previously made, as well as those he should thereafter make, in payment of appellant's debts, as deductions from his otherwise equal share.

The case of *Stanton v. Stanton, supra,* has been cited by both appellant and appellees, and the clear reasoning therein expressed by this court points the way to the proper solution of this case.

The evidence in this case has been carefully read and the decree of the district court is the correct construction and findings of fact under the terms of the will and the evidence adduced, and it is hereby

AFFIRMED.

IN RE APPLICATION OF PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT.

HAROLD E. COATES, ADMINISTRATOR, ET AL., APPELLEES, V. PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, APPELLANT.

289 N. W. 383

FILED DECEMBER 20, 1939. No. 30661.

1. **Eminent Domain.** The damages that are recoverable in a condemnation action are those that arise as a consequence of the condemnation, and from no other cause.
2. ———. The evidence as to the value of the land taken and damaged by the condemnation proceeding must be based upon its value in the condition in which it was at the time of the condemnation.
3. ———. Liability to respond in damages arises from the nature of the acts, not from the identity of the parties.

APPEAL from the district court for Lincoln county: J. LEONARD TEWELL, JUDGE. *Reversed.*

Beeler, Crosby & Baskins and *Robert B. Crosby,* for appellant.

J. T. Keeffe and *Harold E. Coates, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and FALLOON, District Judge.

SIMMONS, C. J.

This is an action brought by the appellant for the purpose of acquiring a right of way across lands of the appellees for the construction, operation, and maintenance of drainage ditches. The appellees hereinafter will be called the plaintiffs and the appellant hereinafter will be called the defendant. The defendant appeals from an award in favor of the plaintiffs.

The following statement of facts is all that is necessary for the purpose of the question here presented and determined. The defendant is a corporation organized and existing under and by virtue of Senate File No. 310, Laws of Nebraska 1933, ch. 86; Comp. St. Supp. 1939, secs. 70-701 to 70-715. The defendant constructed and put in operation

a diversion canal and storage reservoir in Lincoln county, known as the Sutherland reservoir. Shortly thereafter, seepage water appeared on lands between the reservoir and the river, and a large part of the plaintiffs' lands became water-logged and seeped. "This seepage, or a portion thereof" came from impounded waters in the reservoir. The defendant, being "in part at least" liable for the seeped and water-logged condition of the land, proposed the construction of a drainage system, and for that purpose brought this action to condemn land, including parts of the water-logged and seeped lands of the plaintiffs. It is agreed by both parties that this is not an action for damages arising out of seepage of said lands.

During the examination of plaintiffs' first witness, the trial court, in ruling upon the introduction of testimony, stated:

"The court, in the trial of this case, rules that the measure of damage in this case will be such as to consider the land as if it were completely dry and had never been seeped in any manner, and as if though it never would be seeped, the measure of damages being the value of the land actually taken as if dry, and as if it never had been seeped and never would be seeped, plus consequential damages to the rest of the land by virtue of the construction of the ditch, such balance of the land also being treated as though it were dry and had never been seeped and never in fact would be seeped. This is upon the theory that another action for damages for the seepage may be recovered, but not in this case. Any other rule would prevent the plaintiff from recovering consequential damages to the balance of the land on account of the benefits of this ditch being sufficient to offset the consequential damages to the balance of the land. If the value were taken as of the date of the beginning of these proceedings, with the seepage upon it, the consequence would be that the land taken would be of little or no value. The attorneys therefore will try the case upon the theory that seepage is not there at all."

The trial court followed this theory in its instructions

to the jury and in the jury's verdict which the court approved.

Is it a correct statement of the law?

Section 7, Senate File No. 310, *supra,* provides in part as follows: "In addition to any other rights and powers hereinabove conferred upon any district organized under the provisions of this act, such district shall have and exercise the power of eminent domain for the purposes and after the manner provided for in sections 46-602, 46-603, 46-607, 46-608, 46-617, Compiled Statutes of Nebraska, 1929, or in any one or more of said sections." See Comp. St. Supp. 1939, sec. 70-707.

"In case of the refusal of the owner or claimant of any lands through which such ditch, canal or other works are proposed to be made or constructed, to allow the passage thereof, the person, desiring the right of way, may present to the judge of the county in which such lands are situated, a petition describing the lands to be crossed, the size of the ditch, canal or works, the quantity of land which is required to be taken, and setting forth the names of the parties interested in the lands to be crossed, and praying for the appointment of five appraisers, disinterested freeholders of said county, to ascertain the compensation to be made to such owners or parties interested. Upon the filing of said petition, the same proceedings for condemnation of such right of way shall be had as is provided by law for the condemnation of rights of way for railroad corporations; and the same provisions of law providing for the condemnation of rights of way for railroad corporations, the payment of damages and the rights of appeal shall be applicable to irrigation ditches, canals and other works provided for in this article." Comp. St. 1929, sec. 46-603.

This court has held:

"The damages to which a landowner is entitled by reason of the construction of a railway across his farm are (1) the actual value of the land taken at the time of the taking, without diminution on account of any benefit or other setoff whatsoever; (2) the depreciation in value of the re-

mainder of the farm, caused by the appropriation of a part thereof for railway purposes, and the construction and permanent operation and occupation of the railroad thereon, excluding general benefits." *Omaha S. R. Co. v. Todd*, 39 Neb. 818, 58 N. W. 289.

"The elements of damage for the construction of a railroad across a farm are the actual value of the portion taken and the depreciation in value of the remainder caused by the proper construction and operation of the railroad, excluding general benefits." *Chicago, R. I. & P. R. Co. v. Buel*, 56 Neb. 205, 76 N. W. 571.

"Where land is taken from the owner by the power of eminent domain, the owner is entitled to receive the full market value of such land as of the date it was appropriated." *Stewart v. City of Lincoln*, 108 Neb. 825, 189 N. W. 279.

"The compensation for land taken by right of eminent domain is measured by its market value at the time taken, and no evidence is admissible of its peculiar value for special reasons to its owner." *Wiles v. Department of Public Works*, 120 Neb. 689, 234 N. W. 918.

"The measure of damages for land taken for public use is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking." *McGinley v. Platte Valley Public Power and Irrigation District*, 133 Neb. 420, 275 N. W. 593.

"Actual market value at the time of the institution of the condemnation proceedings is usually the inquiry." 18 Am. Jur. 877, sec. 242.

"The just compensation, required by the clause in the Constitutions, to be made to the landowner, is to be measured by the loss occasioned to him by the appropriation." 2 Kinney, Irrigation & Water Rights (2d ed.) 1941, sec. 1081.

These general rules are not in dispute. The difficulty presented is caused by the trial court's requirement that the case be tried "upon the theory that seepage is not there at

all," rather than upon the fact that seepage was there. In this action, is the defendant required to pay for the land taken and the resulting damages to the remaining land, based upon its seeped condition, or should the values be based upon what its value and condition were before the seepage occurred? It is obvious that, under the "theory" of the trial court, the witnesses were required to base their opinion as to value upon a pretended and nonexistent situation. The record discloses that some of the witnesses found it impossible to disassociate the fact from the theory and were permitted to testify as to values based in part upon the fact of the seeped condition. When, as here, the jury were permitted to view the premises, they were permitted to see a condition of fact as to the condition of the land, not in accord with the "theory" upon which the court required the case to be tried, and not in accord with the requirement of the verdict which they rendered.

The damages that are recoverable in a condemnation action are those that arise as a consequence of the condemnation, and from no other cause. Compensation is to be recovered in this action for the depreciation in value caused by the taking of land and the construction and operation of the drainage ditch, and not for that caused by the seepage of water from the reservoir.

Here the issue is the damage caused by the condemnation. The damage caused by the seepage from the reservoir is not an issue.

It necessarily follows that the evidence as to the value of the land taken and damaged by the condemnation proceedings must be based upon its value in the condition in which it was at the time of the condemnation. The damage caused to this same land by seepage from defendant's reservoir gives rise to a cause of action for which damages may be presently recovered in a proper action. See *Applegate v. Platte Valley Public Power and Irrigation District*, 136 Neb. 280, 285 N. W. 585. "Damages from seepage shall be recoverable when and if it accrues." Laws 1933, ch. 86, sec. 7; Comp. St. Supp. 1939, sec. 70-707.

The error of the trial court can be demonstrated by one illustration. Suppose "A" built the reservoir and caused the seepage damage. Suppose "B" proposed to drain the land and brought this action for condemnation. Then it is clear that "A" would be liable for damages for the seepage, and "B" would be liable for damages for the condemnation. It is also obvious that the damages which "B" would be required to pay would be based upon the value of the land already damaged by seepage. The fact that in the instant case "A" and "B" are one and the same does not alter the situation. Liability to respond in damages arises from the nature of the acts, not from the identity of the parties.

This error of the trial court permeates the evidence, the instructions, and the jury's verdict. It is a prejudicial error that requires a reversal of the case and makes a discussion of the other errors assigned unnecessary.

REVERSED.

DANIEL BOCIAN, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

289 N. W. 372

FILED DECEMBER 20, 1939. No. 30700.

1. **Master and Servant.** The law that permits a conductor on a passenger car to make a reasonable assault upon a dangerous person, when necessary for the protection of passengers, does not apply to a wrongful assault by the foreman of a railroad section crew upon a member thereof.
2. ———. Under the federal employers' liability act, an interstate railroad carrier is not liable in damages for an assault by a section foreman upon a member of the section crew, unless the negligent or wrongful act was committed within the scope of the foreman's employment or directed or authorized by the carrier.
3. **Courts.** In the administration of the federal employers' liability act, pertinent opinions of the federal courts are binding on state courts.
4. **Master and Servant.** Under the federal employers' liability act, liability of an interstate carrier is not created by conduct of

the wrong-doer, if impelled by motives that are wholly personal to him or to gratify his own feelings of resentment.

5. ———. Under the federal employers' liability act, the burden of proving an actionable injury resulting in whole or in part from the negligence of any of the officers, agents or employees of an interstate carrier, while the wrong-doer was acting within the scope of his employment, is on a plaintiff who claims damages as the proximate cause of such negligence.

6. Trial. Correct instructions to the jury do not cure prejudicial error in other misleading and contradictory instructions on the same issue.

APPEAL from the district court for Colfax county: LOUIS LIGHTNER, JUDGE. *Reversed.*

Thomas F. Hamer, George C. Holdrege, Walter B. Sadilek and *William J. Schall,* for appellant.

Wagner, Wagner & Albert, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and FALLOON, District Judge.

ROSE, J.

This action was brought under the federal employers' liability act, making an interstate railroad carrier liable to an employee for an injury "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier," if the negligent act is committed within the scope of the wrong-doer's employment or directed or authorized by the carrier. 45 U. S. C. A. ch. 2, sec. 51.

Plaintiff, Daniel Bocian, was employee. Defendant, Union Pacific Railroad Company, was employer. Plaintiff was a member of a section crew engaged in repairing defendant's railroad track near Rogers in Colfax county. John Demos was defendant's section foreman. He assaulted plaintiff April 11, 1938, and shoved him off the shoulder of the railroad track at about 2:30 p. m. into a ditch, where he was allowed to remain without attention until evening. After the assault plaintiff had a hernia in the scar of a former appendectomy.

Plaintiff alleged in his petition that the assault was com-

mitted within the scope of the foreman's employment; that the foreman was a person of violent temper and vicious character and disposed to assault men under him in order to induce them to work faster, facts within the knowledge of defendant; that the assault was made for such purpose; that as a result of the assault plaintiff was totally disabled and suffered great physical pain and mental anguish; that the injuries were permanent. There was a prayer for judgment in the sum of $2,990.

In the answer to the petition it was admitted that defendant was an interstate carrier; that John Demos was foreman of the section crew April 11, 1938; denied that plaintiff's injuries were caused by any act of defendant, its agents, servants or employees; alleged injuries of plaintiff were caused by his own acts. The reply to the answer was a general denial.

Upon a trial of the cause there was a verdict in favor of plaintiff for $2,500. From judgment therefor defendant appealed.

On appeal the verdict is challenged as being without support in the evidence, and instructions by the trial court to the jury are criticized as erroneous and prejudicial to defendant.

There is testimony tending to prove the following facts: It was the duty of Demos, the foreman, to keep the tracks in his section in proper repair for railroad purposes. He had authority to direct all other members of the crew in the performance of their duties and to employ and discharge section hands.

While there is testimony to the effect that, in addition to the assault on plaintiff, the foreman previously threw a bucket at another employee, the evidence is wholly insufficient to sustain a finding that, within the knowledge of defendant, the foreman was at the time of the assault a person of violent temper and vicious character and disposed to assault men under him to induce them to work faster, as alleged in the petition.

The law that permits a conductor on a passenger car to

assault a dangerous person, when necessary for the protection of passengers, as pointed out in *Zaitz v. Drake-Williams-Mount Co.*, 107 Neb. 262, 185 N. W. 424, has no application to the present controversy.

The evidence proves that the foreman assaulted plaintiff and thereafter directed other members of the crew to pay no attention to him. Through inhuman cruelty, plaintiff was left for hours after the assault on damp ground in a ditch at the side of the railroad track. There is an entire absence of proof that Demos was authorized or directed by defendant to assault a member of the crew for any purpose.

The law is that an interstate carrier, under the federal employers' liability act, is not liable in damages for such an assault unless it was committed by the wrong-doer within the scope of his employment or directed or authorized by the employer. *Davis v. Green*, 260 U. S. 349, 43 S. Ct. 123; *Allertz v. Hankins*, 102 Neb. 202, 166 N. W. 608; *Zaitz v. Drake-Williams-Mount Co.*, 107 Neb. 262, 185 N. W. 424. In the administration of the federal employers' liability act, pertinent opinions of the federal courts are binding on state courts. *Sullivan v. Chicago & N. W. R. Co.*, 128 Neb. 92, 258 N. W. 38.

A vital issue in the case at bar was whether the foreman made the assault while acting within the scope of his employment. Plaintiff had been in the employ of defendant at different times for several years. On the afternoon of the assault the members of the crew were at work on defendant's railroad track at or near a private crossing not far from Rogers.

In testifying, plaintiff was hampered by failure to understand the English language and his handicap was not entirely overcome by the aid of an interpreter, but he testified in effect that, as directed by Demos, the foreman, he was at work alone with a shovel 200 feet from the other members of the crew; that Demos walked back and forth between him and the crew three times; said nothing first and second times; third time came up, grabbed plaintiff's shovel

and hit him on the right side and he fell on his knees. Demos said to him, "Come with me;" both went to the place where the others were at work; Demos, approaching the crew and rubbing the side of his face, said: "Dan (plaintiff) hit me;" plaintiff took a shovel, Demos grabbed it and threw it on the ground, saying, "Get away. I will kill you;" plaintiff sat on the gravel on the "hobo path" and Demos shouted, "The train is coming;" plaintiff got up, turned around, and Demos hit him on one side of his face and then on the other and pushed him into the ditch and something then bursted in his right side a little above the waist line; fell on the ground and called in vain for help. This is a mere summary from plaintiff's testimony. It appears from other evidence that plaintiff was taken from the ditch in the evening in a helpless if not unconscious condition. In spite of orders to pay no attention to him, his coat was thrown to him by a member of the crew.

Referring to the assault and the incidents connected therewith, Demos, the foreman, testified that he took plaintiff to his place to work; showed him how to do it and returned to the crew; went back to see if plaintiff had done as directed and found he had not; Demos stooped down and asked plaintiff for his shovel to give further instructions and was struck on his left cheek by plaintiff, who was told to go home; that he was fired; that plaintiff, as directed by Demos, followed the latter to the place where the other members of the crew were at work, was shoved into the ditch and was told to stay there; that he had been previously discharged. The foreman explained the cause of the assault as follows: "Because I was mad because he hit me in the face." There were, however, inferences from evidence that he gave plaintiff directions as foreman after he first claimed to have ordered the discharge and that the assault grew out of the failure of plaintiff to perform his duties as directed. Plaintiff testified he did not strike Demos. The evidence is also in conflict as to the discharge of plaintiff before he was assaulted. In a recent case to recover from an employer damages resulting from an employee's assault it was held:

"An act that is incidental to the duties authorized is within the scope of the employment." *Rich v. Dugan,* 135 Neb. 63, 280 N. W. 225.

In the same case, referring to conduct of an employee, the following rule was quoted:

"Such conduct, to come within the rule, must not be impelled by motives that are wholly personal, or to gratify his own feelings or resentment, but should be in promotion of the business of his employment."

This rule conforms to federal law. *Davis v. Green,* 260 U. S. 349, 43 S. Ct. 123.

The burden of proving an actionable injury "resulting in whole or in part from the negligence of any of the officers, agents or employees" of an interstate carrier, while the wrong-doer was acting within the scope of his employment, is on a plaintiff who claims damages as the proximate cause of such negligence. This is the rule of both federal and state courts.

In the case at bar, with evidence as already indicated, the trial court in explaining to the jury the answer to the petition, including affirmative pleas and claims of defendant, gave instruction Number 2, as follows:

"Defendant for its answer to the claims of plaintiff denies the statements and allegations of plaintiff's amended petition and affirmatively pleads and claims that plaintiff had already been discharged at the time the said John Demos assaulted him and that the assault in question was not in the course of the employment of the said John Demos but was a personal matter between him and plaintiff and was made after plaintiff had ceased to work for defendant and as a personal retaliation of the said John Demos on account of the plaintiff having struck the said John Demos and was not in any way connected with or in furtherance of the work of the said John Demos as section foreman. Defendant further claims that the plaintiff was not injured in the affray between himself and the said John Demos but that the rupture complained of was an old one of long standing, from which the plaintiff has been suffering long

prior to the said assault. Defendant further alleges that such assault was not unprovoked but resulted from the misconduct of the plaintiff."

With affirmative defenses and claims thus stated to be that plaintiff was not an employee of defendant at the time of the assault, because previously discharged, and that the wrongful act of the foreman was committed while acting beyond the scope of his employment, the trial court gave instruction Number 4, reading thus:

"The burden in this case is upon the plaintiff who in order to recover herein must prove the allegations of his petition by a preponderance of the evidence and if he does not do so or if the evidence is evenly balanced or if it preponderates in favor of the defendant then the plaintiff cannot recover. The burden is upon the defendant, however, to prove his affirmative allegations and claims."

As already explained, the burden was on plaintiff to prove that he was an employee of defendant at the time of the assault and also that the foreman was then acting within the scope of his employment. The last sentence in the fourth instruction put on defendant the burden of proving that plaintiff was not an employee when assaulted, because previously discharged, and that the wrongful act of the foreman was beyond the scope of his employment, thus misplacing the burden of proof on these issues and making the instructions conflicting—plain error well calculated to mislead the jury to the prejudice of defendant.

The eighth instruction relating to liability under the federal statute omits the essential element that negligence or assault, to be actionable, must be within the scope of the wrong-doer's employment, thus also conflicting with other instructions. Correct instructions to the jury do not cure prejudicial error in other misleading and contradictory instructions on the same issues. *Brooks v. Thayer County*, 126 Neb. 610, 254 N. W. 413; *Toliver v. Rostin*, 120 Neb. 363, 232 N. W. 616; *Koehn v. City of Hastings*, 114 Neb. 106, 206 N. W. 19.

There are complaints of other rulings in the proceedings

below, but, if erroneous, they are not likely to be repeated in this case.

For errors in the instructions, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

FLOYD H. KINYOUN, APPELLEE, V. WILLIAM F. REINSH, APPELLANT.
289 N. W. 382

FILED DECEMBER 20, 1939. No. 30712.

Judgment. Objections to revivor of dormant judgment *held* properly overruled on evidence considered in opinion.

APPEAL from the district court for Douglas county: JOHN W. YEAGER, JUDGE. *Affirmed.*

Lawrence Fredericksen, for appellant.

Fred N. Hellner and *G. H. Seig, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

ROSE, J.

This proceeding was begun in the district court for Douglas county to revive a dormant judgment of the municipal court of Omaha, wherein it was found and adjudged that William F. Reinsh, defendant, owed Floyd H. Kinyoun, plaintiff, $165.75 for necessaries of life. The judgment was entered December 1, 1930, and a transcript thereof was filed in the office of the clerk of the district court for Douglas county October 18, 1938. A conditional order of revivor was made by the district court and served on defendant December 6, 1938. Defendant made a special appearance and objected to a revivor on the ground that the judgment was void because the municipal court was without jurisdiction to pronounce it for the reason there was no service of summons or of other process on him or appearance by him.

After evidence was adduced by plaintiff on his application for revivor and by defendant on his special appearance and objections, the district court found that the judgment was unpaid and that no sufficient cause was shown why it should not be revived. The special appearance and objections were overruled and the judgment revived January 27, 1939, which then with interest amounted to $260.48. Defendant appealed.

On appeal it is argued by defendant that the judgment of the municipal court is void and therefore not subject to revivor. Want of jurisdiction is urged as a fatal defect. The return of the constable to whom the summons was delivered for service recited:

"On Nov. 22, 1930, I received the writ, and on Nov. 28, 1930, served by leaving a certified copy of this writ and all endorsements hereon to the within named William F. Reinsh at his usual place of residence, 2116 Cass St., the defendant, in the city of Omaha, in Douglas county, Nebraska."

The sum of the defense to the application for revivor is that 2116 Cass street, Omaha, was not defendant's usual place of residence November 28, 1930, nor at any other time. At the hearing on the issue of residence, defendant contradicted the return and any other evidence tending to sustain it and presented affidavits and produced oral testimony of witnesses to prove he never resided at 2116 Cass street, the residence of his son. It is evident, nevertheless, that the constable left a certified copy of the summons for defendant at 2116 Cass street, which was the residence of his son. The copy necessarily disclosed the date to appear in court and the amount and nature of the claim—$150 with interest "for medical and surgical services performed."

Plaintiff testified that, two or three days after the copy of the summons had been left for defendant at 2116 Cass street, the latter came to the office of plaintiff with the summons in his hand and said "that was a pretty shabby way for one lodge member to treat another," and that he could not pay the bill. Plaintiff testified further that defendant

made no objections to the bill and never paid it. This testimony in connection with the return of the constable is sufficient to sustain the judgment of revivor. The possession of the copy of the summons left by the constable at the residence of the defendant's son, and the upbraiding of plaintiff for bringing the suit, show that defendant had all the notice that could have been imparted to him by a copy of the summons, and is evidence sufficient in a revivor action for the court to find, together with the officer's return, that 2116 Cass street had been in fact his usual place of residence. In this view of the evidence, there is no error in the revivor. Having reached this conclusion, appeals from subsequent judicial orders enforcing the revived judgment are wholly without merit.

AFFIRMED.

ANDREW C. NELSEN ET AL., PLAINTIFFS, V. A. C. TILLEY, DEFENDANT.
289 N. W. 388

FILED DECEMBER 20, 1939. No. 30716.

1. **Constitutional Law.** The right to engage in a lawful and useful occupation cannot be taken away under the guise of regulation, but such an occupation may be subjected to regulation in the public interest, even though such regulation involves in some degree a limitation on the exercise of the right regulated.
2. ———. Liberty, as used in the state and federal Constitutions, implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.
3. ———. Whether an occupation is charged with such a public interest as to warrant its regulation is a legislative question with which the courts ordinarily will not interfere.
4. **Automobiles.** The regulation of the sale of motor vehicles under the state's police power for the purpose of preventing fraud and promoting the general welfare of the public is a proper subject for legislative action.
5. **Monopolies.** The legislature, under the guise of regulation, may not indulge in arbitrary price fixing, the destruction of

lawful competition, or the creation of trade restraints tending to establish a monopoly.

6. **Licenses.** The sale of new motor vehicles is a lawful business which any person has a right to pursue, subject only to reasonable regulation.
7. **Constitutional Law.** A provision in a regulatory statute limiting the issuance of a motor vehicle dealer's license for the sale of new cars to persons enfranchised by the manufacturers of new motor vehicles is an unlawful restriction upon the right of a person to adopt and follow a lawful industrial pursuit.
8. ———. A section of a regulatory statute which authorizes the administrator to deny an application or revoke a license upon proof of unfitness of the applicant or licensee is not unconstitutional as conferring arbitrary power, where it appears that an adequate appeal to the courts is provided.
9. **Monopolies.** Injuries sustained as a result of fair competition are not protected against by either the state or federal Constitutions.
10. **Constitutional Law.** Where a regulatory statute prohibits price discriminations made with the intent substantially to lessen competition or to create a monopoly or to injure or destroy the business of a competitor, constitutional inhibitions are not infringed.
11. **Statutes.** A section of a regulatory statute providing that the administrator may deny an application or revoke a license for wilfully discriminating in favor of one purchaser of a motor vehicle against another such purchaser is void for indefiniteness, where the element of wrongful intent is not included, all such wilful discriminations not being of themselves unlawful.
12. **Constitutional Law.** The survey provisions of the act, Comp. St. Supp. 1937, sec. 60-913, construed to be advisory and of a regulatory nature not inimical to constitutional provisions.
13. **Statutes.** If a statute be subject to more than one construction, one of which would make the act constitutional and the other unconstitutional, the courts are required to adopt the construction which would make the act valid.
14. **Licenses.** The power to regulate includes authority to license and to collect a reasonable license fee.
15. **Statutes.** Where it appears that unconstitutional portions of an act can be separated from the valid portions and the latter enforced independent of the former, and it further appears that the invalid portions did not constitute such an inducement to the passage of the valid parts that they would not have been passed without them, the former may be rejected and the latter upheld.

Original action by Andrew C. Nelsen *et al.*, against A. C. Tilley, for a declaratory judgment. *Judgment in accordance with opinion.*

Kelso A. Morgan, Joseph B. Fradenburg and *Alfred A. Fiedler,* for plaintiffs.

Walter R. Johnson, Attorney General, and *Philip M. Klutznick,* for defendant.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

CARTER, J.

This is an original action seeking a declaratory judgment interpreting a statute regulating and licensing the sale of motor vehicles, Comp. St. Supp. 1937, secs. 60-901 to 60-919, inclusive.

The evidence shows that the A. C. Nelsen Auto Sales, a corporation, has a motor vehicle dealer's license authorizing it to sell new Nash automobiles, and that it has no license to sell other makes of new cars. It is stipulated that A. C. Nelsen Auto Sales has purchased and sold new automobiles other than those manufactured by Nash, and unless it be violative of this act to do so, it intends to continue to buy and sell new automobiles of all makes, using a dealer's license for the sale of new Nash cars only. It is also stipulated that the Central Credit Corporation does not directly deal in automobiles, but that it does make loans secured by chattel mortgages on new and used cars, and that it is often necessary to repossess both new and used automobiles when defaults occur. The Central Credit Corporation also alleges that a part of its business is to purchase new cars at chattel mortgage, bankrupt and execution sales for the purposes of resale. It is stipulated that Central Credit Corporation has no dealer's license to sell new cars, and that it cannot obtain one under the statute in question. The plaintiff A. C. Nelsen is the owner of all the stock of the Central Credit Corporation and A. C. Nelsen Auto Sales, except qualifying shares, and has an automobile salesman's license issued under the questioned statute.

It is stipulated for the purposes of this suit that the A. C. Nelsen Auto Sales and the Central Credit Corporation sometimes wilfully discriminate, either directly or indirectly, in prices between different purchasers of automobiles of like grade and quality, where the effect thereof may be substantially to lessen competition, or tend to create a monopoly, or to injure or destroy the business of a competitor. It is also stipulated that the plaintiffs are wilfully discriminating in favor of one purchaser and against others by contracting to furnish or furnishing service or facilities, or allowing discounts or rebates upon terms not accorded to all purchasers. It is also stipulated that plaintiffs are wilfully and habitually making excessive trade-in allowances on used motor vehicles for the purpose of lessening competition or destroying a competitor's business. In addition to the request of the plaintiffs for an interpretation of the statute to determine its exact meaning, plaintiffs contend that certain parts of the act contravene the Fifth and Fourteenth Amendments to the Constitution of the United States, and sections 1, 16, 21 and 25, art. I, and section 1, art. II of the Constitution of Nebraska. The decision will be limited, therefore, to a consideration of the business practices indulged in by plaintiffs and the relation of such practices to the statute before us, including the claims of unconstitutionality.

The plaintiffs contend that the regulation of the motor vehicle industry serves no public purpose; that such regulation does not promote the health, safety, morals or general welfare of the public, and consequently is inimical to the due process clauses of the state and federal Constitutions. Plaintiffs also contend that it is an unlawful interference with their right to contract, and amounts to a discrimination in respect to ownership and enjoyment of property contrary to constitutional inhibitions.

Whether these questions are to be determined as being within the prohibitions of the state and federal Constitutions, or within the broad field of legislative action known as the police power, presents a question that has brought much confusion into the jurisprudence of this country.

Liberty of contract and the right to use one's property as one wills are fundamental constitutional guarantees, but the degree of such guarantees must be determined in the light of social and economic conditions existing at the time the guaranty is proposed to be exercised, rather than at the time the Constitution was approved, otherwise legislative power becomes static and helpless to regulate and adjust to new conditions constantly arising. *State v. City of St. Petersburg*, 133 Fla. 766, 183 So. 304; *Miami Laundry Co. v. Florida Dry Cleaning & Laundry Board*, 134 Fla. 1, 183 So. 759. The balance between due process and the police power is therefore more or less unstable, as it must necessarily keep pace with the economic and social orders. As the exercise of the police power increases to meet new conditions, the protection of the due process clauses must necessarily recede to a corresponding degree. A proper consideration of the act requires us, therefore, to construe it in the light of the later decisions, rather than the earlier ones which were controlled by circumstances and conditions playing no part in the case now before us.

It is clear that the state cannot prohibit the ordinary business of buying and selling new or used motor vehicles. It may, however, regulate a business to promote the health, safety, morals or general welfare of the public. It may also regulate a business, however honest in itself, if it may become a medium of fraud. The state may, to some extent, compel honesty by imposing a license fee, if widespread frauds upon and losses by its people are thereby prevented. The liberty guaranteed to us by the Constitution implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. Ed. 328, 31 S. Ct. 259.

It is the contention of plaintiffs that there is no basis that warrants the regulation of the sale of new and used motor vehicles in this state. It cannot be seriously disputed that the motor vehicle industry has grown to huge proportions in both the state and nation. Motor vehicles, once

luxuries, are now necessities. The handling of motor vehicles has become a complex business. The sale of new automobiles is closely tied in with the purchase, trade and sale of used cars. The possibilities of fraud upon the public have correspondingly increased. The elimination of harmful trade practices and dishonest dealings resulting in injury to the purchasing public may have been, and undoubtedly was, a factor in the passage of the act. Many courts have sustained similar legislative enactments. The "Blue Sky Laws" of Ohio and other states, which require dealers in corporate stocks and other securities to be licensed, have been held constitutional. *Hall v. Geiger-Jones Co.*, 242 U. S. 539, 61 L. Ed. 480, 37 S. Ct. 217. Licenses may be required for the operators of employment agencies. *Brazee v. Michigan*, 241 U. S. 340, 60 L. Ed. 1034, 36 S. Ct. 561. The business of selling patent rights, being peculiarly one in which fraud may be practiced, may be regulated. *Allen v. Riley*, 203 U. S. 347, 51 L. Ed. 216, 27 S. Ct. 95. A commission merchant's business has been held subject to regulation. *State v. Mohler*, 98 Kan. 465, 158 Pac. 408. Creameries may be licensed to insure honest dealing in weighing and testing the produce purchased. *Cofman v. Custerhous*, 40 N. Dak. 390, 168 N. W. 826. Wholesale produce dealers have been held subject to regulation. *State v. Levitan*, 190 Wis. 646, 210 N. W. 111; *State v. Wagener*, 77 Minn. 483, 80 N. W. 633; *Payne v. State of Kansas*, 248 U. S. 112, 63 L. Ed. 153, 39 S. Ct. 32. Sellers of bread may be regulated to protect purchasers from imposition by the sale of short-weight loaves. *Petersen Baking Co. v. Bryan*, 290 U. S. 570, 78 L. Ed. 505, 54 S. Ct. 277; *Id.*, 124 Neb. 464, 247 N. W. 39. Whatever the personal views of this court may be as to the necessity of such legislation, the fact remains that the legislature of the state concluded that a reasonable basis existed for its enactment and, there being some foundation in fact to justify legislative action, this court is powerless to substitute its judgment for that of the legislature even if it cared to do so. *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549, 66 N. W. 624. We conclude that the

legislature has the authority under the police power to regulate the purchase and sale of motor vehicles for the protection and general welfare of the public.

But the legislature, under the guise of regulation, may not indulge in arbitrary price fixing, the destruction of lawful competition, or the creation of trade restraints tending to establish a monopoly. It is contended that subdivision (a) of section 60-906, Comp. St. Supp. 1937, tends toward the creation of a monopoly. It is as follows: "Motor Vehicle Dealer's License: This license shall permit the licensee to engage in the business of selling or exchanging new and used motor vehicles or both; Provided, such license as it pertains to the sale or exchange of new motor vehicles shall be limited to such new motor vehicles as the licensee discloses in his application he is enfranchised to sell. This form of license shall permit one person named thereon to act as a motor vehicle salesman."

Plaintiffs argue that the limitation of a license to sell or exchange new motor vehicles to those which the applicant is enfranchised to sell creates a monopoly in those persons enfranchised by the manufacturers to sell new automobiles. The sale of new motor vehicles is a lawful business which any person has the right to pursue, subject to reasonable legislative regulation. No person, who complies with such reasonable regulations as the legislature may prescribe, may be arbitrarily deprived of that right. We agree that the limitation contained in subdivision (a) creates a monopoly in the persons enfranchised by the manufacturers of motor vehicles and thereby contravenes the Fourteenth Amendment to the Constitution of the United States, and sections 1, 3, 16 and 25, art. I of the Constitution of Nebraska. We base our holding in part on the case of *Hall v. State,* 100 Neb. 84, 158 N. W. 362, wherein this court said that an attempt on the part of the legislature to limit the sale of anti-hog cholera serum to persons holding a United States government veterinary license is a restriction upon the right of a person to adopt and follow a lawful industrial pursuit, it appearing that such government licenses were

issued only to the manufacturers of the serum. Also, in *State v. Geest*, 118 Neb. 562, 225 N. W. 709, this court said in a case similar in principle: "A law which restricts to registered pharmacists the sale of such articles as salt, soda, soap, distilled water, corn starch, and other useful but harmless articles, does not tend to promote the public health or welfare, but tends to place in the hands of a limited class a monopoly of the sale of such articles. Such an act is beyond the scope of the police power and is invalid." In the instant case, the issuance of a license to sell new cars is limited to those enfranchised by the manufacturer of the new motor vehicles to be sold. The effect would be that the business of selling new cars would be monopolized by dealers enfranchised by the manufacturers. It constitutes an attempt to create a monopoly, a power that the legislature does not possess. The legislature cannot prohibit a citizen from engaging in the lawful business of selling and exchanging new motor vehicles by licensing the business and limiting the issuance of licenses to a favored few. We therefore hold that the limitation contained in subdivision (a) of section 60-906, Comp. St. Supp. 1937, is unconstitutional and wholly void.

In the light of the foregoing holding, any person desiring to engage in the purchase and sale of new automobiles is entitled to a license upon payment of the fee and a compliance with the valid requirements of the act. This removes from our consideration the rights of the plaintiffs to sell new cars under the act before us, as each would be entitled to obtain a license to sell new cars without a limitation as to make. The defendant contends that the act contains no restraints tending to create monopoly for the reason that a manufacturer engaged in private business may lawfully announce in advance the retail prices at which his goods may be resold and refuse to deal with persons who do not conform to such prices. We concede for the purposes of this suit that the foregoing is a correct statement of the law, but it has no application here. A person may do business with whomsoever he desires and he may likewise

refuse business relations with any person if he sees fit. *Hompes v. B. F. Goodrich Co., ante,* p. 84, 288 N. W. 367. But the fact that manufacturers may lawfully contract with such persons with whom they choose to deal can add nothing to the power of the legislature if its enactments clash with restraints imposed upon it by the Constitution.

Plaintiffs contend that subdivision (f) of section 60-912 of the act, providing that the administrator shall have power to deny an application or revoke a license upon proof of unfitness of the applicant or licensee, is unconstitutional for the reason that it confers arbitrary power upon the administrator. We think this point has been decided contrary to the contentions of plaintiffs by a former decision of this court. We have held that a statute providing that the secretary of state shall have the power to reject any application for a license to lend money after a hearing does not confer arbitrary power upon the secretary of state. *Althaus v. State,* 99 Neb. 465, 156 N. W. 1038. In the instant case, a simple method of appeal to the district court is provided in which the licensee, by giving a one hundred dollar bond, may supersede the order of the administrator denying his application or revoking his license. Comp. St. Supp. 1937, sec. 60-916. Adequate protection against the exercise of arbitrary power is thereby provided. The situation respecting the ascertainment of qualifications as to fitness and suitability by an administrative officer under legislative direction is aptly stated in *Kreutzer v. Westfahl,* 187 Wis. 463, 204 N. W. 595, as follows: "The statutory directions for ascertaining the qualifications and fitness of the applicants for permits are not so explicit, and the argument is made that there is no standard for their selection and that in this respect the statute attempted to confer arbitrary power on the commission. The applicant is required to furnish a written statement showing his previous business history and such other facts as may be required. The commission, if it is deemed advisable, may make a detailed examination of his business and conduct, and if satisfied as to his good business reputation and conduct it is

required to issue the permit. It cannot be doubted that the legislature has the power to determine the qualifications of persons engaging in a business which from its nature affords opportunities for defrauding the public. In this statute it has declared what these qualifications shall be. The legislature might have added language prescribing in great detail the qualifications of applicants for permits and the mode of ascertaining those qualifications, but it is a question whether such details would not have tended to confuse rather than enlighten."

To the same effect is *Highland Farms Dairy v. Agnew*, 300 U. S. 608, 81 L. Ed. 835, 57 S. Ct. 549, in which the court said: "The statute is not invalid for failing to prescribe the standards to be applied by the commission in granting licenses or refusing them. The obvious purpose of the license is to provide the commission and the members of the local boards with a record of the distributors and producers subject to the act. Supervision and enforcement are thus likely to be easier. No inference is permissible that any one was intended to be excluded because of favor or caprice. * * * Indeed the statute makes provision * * * that an order refusing to issue a license, or suspending or revoking one, may be reviewed on appeal to the Supreme Court of Appeals. There is sedulous protection against oppression or abuse of power. One who is required to take out a license will not be heard to complain, in advance of application, that there is danger of refusal. * * * He should apply and see what happens." We conclude therefore that subdivision (f) is not void for failure to provide more definite standards for determining qualifications as to fitness. The statute adequately protects against the exercise of arbitrary power by the administrator of the act. The subdivision in question, when considered with other parts of the statute, conforms with constitutional requirements.

Plaintiffs contend that three other subdivisions of section 60-912 of the act violate constitutional provisions; and because of their similarity in principle, they will be con-

sidered together in this opinion. The subdivisions in question provide that the administrator may deny or revoke a license on proof that the applicant or licensee is (i) wilfully discriminating, either directly or indirectly, in price between different purchasers of a commodity of like grade or quality where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly or to injure or destroy the business of a competitor, (j) wilfully discriminating in favor of one purchaser of a motor vehicle by furnishing or contracting to furnish services or facilities or allowing discounts or rebates in connection with the sale or offering for sale of such motor vehicles so purchased upon terms not accorded all purchasers on proportionately equal terms, and (k) wilfully and habitually making excessive trade-in allowances on used motor vehicles for the purpose of lessening competition or destroying a competitor's business.

This court is committed to the doctrine that constitutional guaranties "contemplate that every person legally possesses the right of acquiring the absolute and unqualified title to every species of property recognized by law, with all rights incidental thereto, and, in connection with the right of personal liberty, it includes the right to dispose of such property in such innocent manner as he pleases, and to sell it at such price as he can obtain in fair barter." *State v. Ruback,* 135 Neb. 335, 281 N. W. 607. A person has the right to adopt and follow any lawful business pursuit, not injurious to the community, which he may see fit, without being subjected to arbitrary restraints. Incidental to this, he has the right to labor or employ labor, make contracts in respect thereto upon such terms as the parties may agree, and to purchase, sell, inherit, sell and convey property of all kinds. Under the guise of regulation, these rights may not be arbitrarily abridged. *State v. Sperry & Hutchinson Co.,* 94 Neb. 785, 144 N. W. 795; *Hall v. State,* 100 Neb. 84, 158 N. W. 362.

It will be noted therefore that in subdivisions (i) and (k) the prohibited acts are unlawful only where the effect of

such discrimination may be substantially to lessen competition or tend to create a monopoly or to injure or destroy the business of a competitor. The act itself is not prohibited; it is the act accompanied by an intent to accomplish a result made unlawful by the statute which the legislature attempted to correct. Injuries sustained as a result of fair competition are not protected against by either the state or federal Constitutions. It is only when the act is accompanied by a wrongful intent, established by sufficient and competent evidence, to lessen competition, to establish a monopoly, or to injure or destroy the business of another that the penalty provided by the statute can be imposed. Properly interpreted, the subdivisions in question provide for reasonable regulations, and do not constitute the exercise of arbitrary powers or an interference with the rights of property or personal liberty guaranteed to us by the state and federal Constitutions.

As to subdivision (j), the element of intent is lacking. The prohibition is against wilful discrimination in favor of one purchaser against another in the respects noted therein, without reference to the intent or motive of the person so doing. It is in effect a price fixing statute. It is violative of the holdings heretofore cited and of the constitutional prohibitions hereinbefore referred to. Certainly, a person may sell his property for any price he cares to sell it for, unless it be accompanied by an intent to accomplish a purpose that is unlawful. If the statute purports to prohibit every wilful discrimination in price, every agreement to furnish services, every allowance of a discount or rebate, and every sale of a motor vehicle at other than a fixed standard price, it conflicts with constitutional restraints imposed on the legislature with reference to the acquisition, ownership and enjoyment of property, and the guaranty that no person shall be deprived of life, liberty or property without due process of law. If any of such acts were not intended to be inhibited by the statute, the case then falls squarely within our holding in *State v. Ruback, supra,* wherein we said: "The test to determine whether a statute

defining an offense is void for uncertainty (1) is whether the language may apply not only to a particular act about which there can be little or no difference of opinion, but equally to other acts about which there may be radical differences, thereby devolving on the court the exercise of arbitrary power of discriminating between the several classes of acts. * * * It is obvious that the terms of the statute under consideration are indefinite and uncertain. The elements of the crime it attempts to define and punish are not so clearly expressed that the ordinary person is apprised in advance as to what course it is lawful for him to pursue, and the intent and purpose of the sovereign is not clearly declared." We are therefore obliged to hold that subdivision (j) of section 60-912 of the act is invalid and of no force and effect.

Plaintiffs contend that the survey provisions of the act, section 60-913, Comp. St. Supp. 1937, are unconstitutional and void because they result in price fixing by the exercise of arbitrary power on the part of the administrator of the act. The section under consideration provides: "For the purpose of determining whether or not an applicant for a license or a holder of a license has violated any of the provisions of this law with particular regard to price discrimination and excess allowances on used motor vehicles, the administrator may authorize or at the request of 40% of the licensed motor vehicle dealers in any county or section larger than a county of this state, shall authorize a survey to be made to determine a fair basis for allowances to be made for used cars in purchases thereof or exchanges for other new or used cars. Such survey, if made, shall be amended from time to time as market conditions change and copies of the survey and amendments thereto shall be made available to all licensed dealers and salesmen. Said survey shall serve as a guide and shall in no way be binding upon any licensed dealer or salesman except for the purposes stated hereinbefore in this Act."

We quite agree that, in construing an act of the legislature, all reasonable doubt must be resolved in favor of

constitutionality. Likewise, it has been held that, if a statute is subject to more than one construction, one of which would make the act constitutional and the other unconstitutional, this court is required to adopt the former. *Hinman v. Temple*, 133 Neb. 268, 274 N. W. 605; *Abie State Bank v. Weaver*, 119 Neb. 153, 227 N. W. 922.

It will be noted that the survey provision provides that the administrator shall authorize a survey to be made to determine a fair basis for allowances to be made for used cars in purchases thereof or exchanges for other new or used cars. It is to be used by the administrator to determine whether price discriminations exist. The completed survey is advisory only to the administrator. No provision for its admission as evidence is made. It is not even made *prima facie* evidence of the market price of used automobiles. All the other elements of the offense must be established, including the fact that the discrimination was unlawful. It is true that copies of the survey are to be made available to all licensed dealers to be used as a guide in their business transactions. Dealers are not required by the act to comply with the prices fixed in the survey. This being true, it is not a price fixing statute, nor one authorizing the use of arbitrary power by the administrator of the act. It is merely a statutory means which the administrator shall use in judging whether there have been price discriminations, either lawful or unlawful. Construed as a guide in the determination of price discriminations in carrying on a business decreed by the legislature as subject to regulation, the survey provision must be said to be regulatory in character. *City of Newman v. Atlanta Laundries, Inc.*, 174 Ga. 99, 162 S. E. 497.

Plaintiffs contend that section 60-908 of the act, providing for the collection of license fees, is unconstitutional and void. We think the law is that power to regulate includes authority to license, and authority to license includes authority to collect a reasonable license fee. *Commonwealth v. Clay*, 224 Mass. 271, 112 N. E. 867; *Opinion of the Justices*, 250 Mass. 591, 148 N. E. 889; *Paramount Pictures Dis-*

tributing Co. v. Henneford, 184 Wash. 376, 51 Pac. (2d) 385.

The question arises whether the parts of the act found herein to be invalid are sufficient to vitiate the whole act. The act itself provides that, if any section, sentence, clause, phrase or requirement of this act is held unconstitutional, such decision shall not affect the validity of the remaining portions thereof. This evidences an intent on the part of the legislature to have the valid parts of the statute in force if some be declared unconstitutional. The applicable rule is: "If a portion of a legislative act is unconstitutional and it can be separated from other portions of the act and the latter enforced independent of the former, and it further appears that the unconstitutional part did not constitute such an inducement to the passage of the other parts of the law that they would not have been passed without it, the former may be rejected and the latter upheld." *State v. Stuht,* 52 Neb. 209, 71 N. W. 941. Also, *State v. Price,* 129 Neb. 433, 261 N. W. 894; *Laverty v. Cochran,* 132 Neb. 118, 271 N. W. 354; *State v. Howard,* 96 Neb. 278, 147 N. W. 689.

In our opinion, a workable plan remains after the invalid portions are stricken out. An invalid proviso relating to the licensing of the sale of new motor vehicles has been herein nullified. Also, one cause for the denial of an application for a license or the revocation of an existing license, as the case may be, has been invalidated. Can it be said that these two sections of the act were such an inducement to its passage that it would not have been enacted if they had not been included? We think not. See *Weller v. New York,* 268 U. S. 319, 69 L. Ed. 978, 45 S. Ct. 556; *Highland Farms Dairy v. Agnew,* 300 U. S. 608, 81 L. Ed. 835, 57 S. Ct. 549. We think the saving clause contained in the act, together with the nature of the invalid parts that have been nullified and the relation they bore to the remaining portions of the act, are such as to permit the remaining valid parts of the statute to remain in full force and effect.

We conclude that plaintiffs' allegations of unconstitu-

tionality as shown in the pleadings are without merit, except as otherwise declared in this opinion.

JUDGMENT ACCORDINGLY.

MELVIN DOBESH, APPELLEE, V. ASSOCIATED ASPHALT CONTRACTORS, INC., ET AL.: VILLAGE OF ANSLEY ET AL., APPELLANTS.

289 N. W. 369

FILED DECEMBER 20, 1939. No. 30741.

Appeal. When it appears that an appeal was dismissed solely because the transcript did not show facts sufficient to give this court jurisdiction on appeal due to mistake in the preparation of such transcript, and it further appears that appellant was not apprised of such defects in the transcript until the judgment of the court was entered dismissing the appeal, this court will, if timely application be made accompanied by a showing of such mistake, vacate the order of dismissal and permit a correction of the record by the filing of a supplemental transcript.

APPEAL from the district court for Custer county: BRUNO O. HOSTETLER, JUDGE. *Judgment of dismissal vacated, and leave to file supplemental transcript granted.*

Evans & Lee, Chambers, Holland & Locke and *T. J. Kiesselbach,* for appellants.

Allan F. Black and *Perry, Van Pelt & Marti, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

CARTER, J.

This is a motion to vacate a judgment dismissing an appeal for want of jurisdiction in a compensation case, and for leave to file a supplemental and amended transcript showing that jurisdiction in fact existed.

When this case was previously before this court, it was discovered that the transcript showed that the judgment in the district court was entered on May 8, 1939. The

record before the court further showed that an authenticated transcript of the proceedings was filed in this court on June 12, 1939. The motion for a new trial was shown therein as having been filed on May 15, 1939. We held, correctly we think, that the motion for a new trial and the transcript of the proceedings were filed out of time and that this court did not have jurisdiction to hear the appeal. *Dobesh v. Associated Asphalt Contractors, ante,* p. 1, 288 N. W. 32.

The appellants now move the court for an order vacating the judgment of dismissal and for leave to file an amended and supplemental transcript for the reason that the records of the district court in fact show that the motion for a new trial was filed on May 15, 1939, and that the judgment was filed and spread on the journal of the court on May 15, 1939, which facts, if properly appearing in the transcript of the proceedings, would lodge jurisdiction in this court.

The record does not show that a motion to dismiss for want of jurisdiction was ever filed in this court by the appellee, or that appellants were apprised of the error of the clerk of the district court at any time prior to the dismissal of the appeal by this court. Obviously, an injustice would be done the appellants to thus finally dispose of their case if, as a matter of fact, a properly prepared transcript would have invoked the appellate jurisdiction of this court.

Appellee contends that the law applicable to such a state of facts casts upon the appellants the duty of procuring and filing a transcript of the proceedings in this court showing all facts necessary for the jurisdiction of this court to attach. While this is undoubtedly the rule in some jurisdictions, we do not think it is a salutary one. In our opinion, the correct rule to be applied to the facts in the case before us is: When it appears that an appeal was dismissed solely because the transcript did not show facts sufficient to give this court jurisdiction on appeal due to mistake in the preparation of such transcript, and it further appears that appellants were not apprised of such defects in the transcript until the judgment of the court was entered dismissing the appeal,

this court will, if timely application be made accompanied by a showing of such mistake, vacate the order of dismissal and permit a correction of the record by the filing of a supplemental transcript. While we do not feel obliged to follow the holdings of other jurisdictions on a matter of practice and procedure, the following cases do sustain the rule announced. *Allerding v. Cross*, 15 Wis. 587; *Dabney v. Stearns*, 73 Wash. 583, 132 Pac. 400; *Linahan v. Barley*, 124 Mo. 560, 28 S. W. 84; *Turner v. State*, 79 Tex. Cr. Rep. 390, 186 S. W. 322; *Sullivan v. Tremont & Gulf Ry. Co.*, 4 La. App. 358.

The judgment of dismissal heretofore entered will therefore be vacated and set aside, and leave granted the appellants to file a supplemental transcript within fifteen days.

JUDGMENT OF DISMISSAL VACATED, AND LEAVE TO FILE SUPPLEMENTAL TRANSCRIPT GRANTED.

JOHN THIES, APPELLEE, V. PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, APPELLANT.

289 N. W. 386

FILED DECEMBER 20, 1939. No. 30517.

1. **Waters.** The evidence set out in the opinion warranted the submission to the jury of whether defendant's diversion dam and reservoir in the North Platte river were the proximate cause of an ice jam and a resulting overflowing of plaintiff's leasehold estate.
2. **Eminent Domain.** Accretions are property within the meaning of section 21, article I of the Constitution, providing that the property of no person shall be taken or damaged for public use without just compensation therefor.
3. **Waters.** The measure of damages for the actionable flooding of a leasehold is its diminution in value for the remaining term.
4. **Dismissal and Nonsuit.** It was not an abuse of discretion to permit the voluntary dismissal of a landowner from an action to enjoin the maintenance of a diversion dam and for the recovery of damages from a flood, brought by him and his tenant, and to allow the tenant alone to file an amended petition at law for the damages to his leasehold claimed in the original petition.

APPEAL from the district court for Keith county: J. LEONARD TEWELL, JUDGE. *Affirmed.*

Beeler, Crosby & Baskins and *Robert B. Crosby,* for appellant.

Halligan, McIntosh & Halligan, contra.

Heard before ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ., and CHAPPELL, District Judge.

JOHNSEN, J.

This is an action for damages to plaintiff's leasehold estate from a flood due to an ice jam, alleged to have been occasioned by defendant's diversion dam and reservoir in the North Platte river in Keith county. A jury returned a verdict in favor of plaintiff for $822.25, and, from the judgment entered thereon, defendant has appealed.

The case is a companion case to *Welsh v. Platte Valley Public Power and Irrigation District,* 135 Neb. 441, 282 N. W. 385, in that it arises out of the same flood. In the *Welsh case,* which was a suit in equity for an injunction and for damages, tried *de novo* in this court, we held that plaintiff had failed to establish by a preponderance of the evidence that the diversion dam and reservoir were the proximate cause of the flood. We accordingly reversed a judgment for plaintiff and dismissed the suit. In this case, which is an action at law for damages, where the weight of the evidence is a matter for the jury and not for us to determine, we are concerned simply with whether there is substantial evidence in support of plaintiff's claim. The question therefore is, not what result we might have reached if we were trying the case *de novo,* but whether there is sufficient evidence to warrant submission of the question of proximate cause to a jury.

From a careful reading of the record, we are obliged to hold that there is. There is evidence on behalf of plaintiff to show that defendant had closed the gates of the dam, for the first time since its construction, about a week before the flood, and that the reservoir thereby became filled with

shallow water, which froze and checked the flow of slush ice through the river, causing it to accumulate and push the water backward, until it ultimately reached and flooded plaintiff's leasehold. There is testimony by eyewitnesses from the neighborhood that they saw the slush ice start piling up and commence to freeze at the dead water line of the reservoir and watched it gradually work backward and push the water over the surrounding lands for a distance of approximately two and a half miles. A qualified engineer testified that, in his opinion, the freezing of the dead, shallow water which had been admitted into the reservoir and the obstruction created thereby to the normal channel flow were the proximate cause of the flood. The record contains further testimony indicating that such a slush ice jam in the fall of the year was unknown in the river prior to the construction and operation of the diversion dam and reservoir. There is other evidence, also, disputing defendant's contention that the diversion dam and reservoir were in no way a causal factor, but that the flood was due solely to towheads and other obstructions in the river and to general weather conditions. We shall not attempt to detail the evidence of defendant or to compare its weight with that produced by plaintiff, for, as has been sufficiently indicated, there was substantial and credible evidence to support plaintiff's contention, and in this situation, irrespective of our personal views, the question of its weight and of plaintiff's right to recover was wholly for the jury.

Defendant contends that plaintiff was in no event entitled to recover for the damages to that portion of his leasehold that consisted of accretion lands in the old river bed, for the reason that all property interests in such lands must be held to be subservient to the use of the bed of the river for public purposes. The state does not hold title to the river beds in Nebraska. *Kinkead v. Turgeon*, 74 Neb. 580, 109 N. W. 744. Such river beds are as effectually the subject of private ownership as other property, except that, in the case of navigable streams, there is an easement for public navigation. "The interest of the public in the waters and

bed of a navigable river is analogous to that of the public in a public road. It has the right of passage over the stream as it has over the road. * * * When by reason of natural changes the stream abandons the bed over which, through the instrumentality of its waters, the public had the right to pass, the right of passage is as effectually abandoned at that point as when a road is vacated and a new one opened to take its place. The right of the public is to travel in the new road, and its right and privilege to pass over the old one revert to the abutting owners; and so with the river, the public right of navigation attaches to the new channel of the stream by virtue of the change of its waters, over which alone the right of navigation can exist, and the abandoned bed, which is of no avail for public use as a means of travel, reverts to the riparian owners to the thread of the channel where the waters flowed." *Kinkead v. Turgeon, supra.* The title of an abutting owner to the accretions to such land is similarly absolute. *Conkey v. Knudsen,* 135 Neb. 890, 284 N. W. 737. It follows that under section 21, article I of our Constitution, an interest in accretion lands, like other property, cannot be taken or damaged for public use without just compensation.

Defendant contends, as a further ground for reversal, that since plaintiff's petition was filed on December 20, 1935, he was entitled to recover such damages only as had accumulated to that date, but that the trial court allowed him to prove and recover damages to March 1, 1936, the date his leasehold expired. This argument overlooks the fact that the diminution in value of plaintiff's leasehold occurred immediately at the time of the flood, and hence the fact that the leasehold ran beyond the date of the institution of suit did not make it an attempt to recover damages which had not yet accrued. The principal elements of damage shown were the destruction of hay and other feed by the inundation, and a deprivation of the use of the land, with its trees and brush, for winter shelter and pasture. The destruction and deprivation were complete and unmitigable from the date of the flood, and hence plaintiff's

damages were definitely fixed as of that time. It was not necessary to wait until the expiration of the leasehold to determine the extent of its diminution in value. Defendant's contention is therefore without merit.

It is further contended that the trial court erred in allowing plaintiff to file an amended petition, over defendant's objection, because it set up an entirely new cause of action and was between different parties than the original petition. The record shows that plaintiff and the owner of the land originally joined in a suit to enjoin defendant from maintaining its diversion dam and to recover damages. Later the action was dismissed as to the owner of the land, and plaintiff filed an amended petition for damages only. The damages which he sought to recover were the same as those which he claimed in the original petition. The order of the trial court permitting the filing of the amended petition was within the authorization of section 20-809, Comp. St. 1929, and, even without the statute, it would not have constituted an abuse of discretion. Procedure must be made as simple a vehicle as possible for direct approach to and prompt and orderly dispatch through the courts.

We find no error in the proceedings of the trial court.

AFFIRMED.

C. B. SCOTT, SPECIAL ADMINISTRATOR, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

289 N. W. 367

FILED DECEMBER 20, 1939. No. 30656.

Workmen's Compensation. A proceeding under section 48-142, Comp. St. Supp. 1939, to modify a previous settlement agreement or an award of the compensation or district court, payable periodically for more than six months, on which the payments have been completed, and to recover additional compensation for an increase in disability, can only be brought within one year from the time the employee knows or is chargeable with knowledge that his condition has materially changed, and that there has been such a substantial increase in his disability as to entitle him to additional compensation.

APPEAL from the district court for Gage county: VIRGIL FALLOON, JUDGE. *Affirmed.*

Vasey & Mattoon, for appellant.

Walter R. Johnson, Attorney General, and *Don Kelley, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

JOHNSEN, J.

This is a proceeding to recover additional compensation under the workmen's compensation law, on the ground of increased disability. The workmen's compensation court held that, since the increase in disability was known to plaintiff more than a year before the filing of her petition, the claim was barred under section 48-138, Comp. St. 1929. On appeal to the district court, the proceeding was similarly dismissed. Plaintiff, who was 73 years old, had died in the meantime, and revivor was had in the name of the special administrator of her estate, who has appealed to this court.

Plaintiff, Louise Scott, fell on a slippery floor in April, 1926, while employed as an attendant at the Nebraska Institution for the Feeble Minded, at Beatrice. She sustained an impacted hip fracture, which resulted in some bone absorption, a somewhat rotated union, and a 1½ inch shortening of the left leg. A petition for compensation was filed before the compensation commissioner and on October 27, 1926, an award was entered, allowing her 161¼ weeks compensation, for 75 per cent. permanent partial loss of use of her left leg, from August 1, 1926. Payments on this award were completed in September, 1929. She had continued in her employment from July, 1926, following the injury, to December, 1935, when her advanced age and physical condition made it impossible for her longer to do the work.

The record shows that for some time prior to December, 1935, she was becoming increasingly disabled. The major portion of the increase was probably due to her age, but the disability in her leg appears also to have increased.

The evidence which she offered, however, clearly indicates that she knew there had been a material change in the condition of her leg prior to the time her employment was terminated in December, 1935. As early as 1929, after the payments on the original award were completed, she claimed to be entitled to further compensation, and her son, who is now the special administrator of her estate, had consulted an attorney for her, about reopening the award. No proceedings, however, were instituted at that time. It is not particularly important here whether the disability in her leg had so increased in 1929 that she would then have been entitled to additional compensation, for, in any event, the son admits that, for at least a year and a half to two years prior to 1935, it was quite obvious that his mother was "breaking," and that the disability to the leg had been materially increasing. The present proceedings were not instituted until November, 1937.

The compensation court and the district court, as has already been indicated, took the view that in this situation the proceeding was barred under section 48-138, Comp. St. 1929, which provides: "In case of personal injury, all claim for compensation shall be forever barred unless, within one year after the accident, the parties shall have agreed upon the compensation payable under this act, or unless, within one year after the accident, one of the parties shall have filed a petition as provided in section 3680 (48-139) hereof. * * * Where, however, payments of compensation have been made in any case, said limitation shall not take effect until the expiration of one year from the time of the making of the last payment." In the case of latent injuries, we have held, of course, that the proceeding may be commenced within the statutory time after the employee first has knowledge that the accident has caused a compensable disability. *Travelers Ins. Co. v. Ohler,* 119 Neb. 121, 227 N. W. 449, and subsequent cases.

It is plaintiff's contention that the limitation provision in section 48-138 has no application to this proceeding; that where a compensation award, payable periodically for more

than six months has once been entered in the compensation or the district court, even though the payments thereunder may have been completed, the court has the power, under section 48-142, Comp. St. Supp. 1935, at any time, without limitation, to modify the award and to make an additional allowance for an increase in disability; that section 48-142 is wholly independent of section 48-138 and that a proceeding thereunder is not controlled by the limitation prescribed in such section. Section 48-142 provides: "All amounts paid by an employer or by an insurance company carrying such risk, as the case may be, and received by the employee or his dependents, by lump sum payments, shall be final, but the amount of any agreement or award payable periodically for more than six months may be modified as follows: (a) At any time by agreement of the parties with the approval of the Compensation Court. (b) If the parties cannot agree, then at any time after six months from the date of the agreement or award, an application may be made by either party on the ground of increase or decrease of incapacity due solely to the injury or that the condition of a dependent has changed as to age or marriage, or by reason of the death of the dependent. In such case, the same procedure shall be followed as in section 48-139, Compiled Statutes of Nebraska, 1929, in case of disputed claim for compensation, except that after the district court has entered order, award or judgment in the case then the application shall be made to that court."

We are unable to accept the argument that, where a court has once entered an award, section 48-142 is intended to give it a perpetual and unexpiring jurisdiction, without limitation as to time, to make additional allowances for any subsequent increase in disability. It should be noted that whatever authority is granted by the section is applicable by its terms, not merely to formal awards entered by the compensation or district court, but to voluntary settlement agreements between the parties as well, made in accordance with the provisions of the law. It is provided that "the amount of any agreement or award payable periodically for

more than six months may be modified," etc. There may be some force in the contention made by defendant, that, from the language employed and the rule applied in parallel legal situations, the section is intended to have application only to agreements or awards on which periodical payments are still being made at the time a modification is sought. Under such a construction, where the payments on a settlement agreement or an award, payable periodically for more than six months, have been completed, additional compensation for an increased disability could only be claimed, if at all, in an independent proceeding. We are not disposed, however, to take this narrow a view of the statute, for the process employed would in either event, for all practical purposes, be the same. In any proceedings had under section 48-142, it is provided that the same procedure shall be followed as in section 48-139, governing initial proceedings to recover compensation, "except that after the district court has entered order, award or judgment in the case then the application shall be made to that court."

We therefore hold that proceedings may be brought under section 48-142, to recover additional compensation for an increased disability, after the payments under a valid agreement or a previous award have been completed, but that a common sense and workable construction of our compensation law requires that the limitation provided in section 48-138 be held to be as much applicable thereto as to a proceeding to recover compensation for a latent disability. And so, a proceeding under section 48-142, Comp. St. Supp. 1935 (*Id.*, Comp. St. Supp. 1939), to modify a previous settlement agreement or an award of the compensation or district court, payable periodically for more than six months, on which the payments have been completed, and to recover additional compensation for an increase in disability, can only be brought within one year from the time the employee knows or is chargeable with knowledge that his condition has materially changed, and that there has been such a substantial increase in his disability as to entitle him to additional compensation.

The argument of plaintiff has been predicated chiefly upon *Johnson v. Iverson,* 175 Minn. 319, 221 N. W. 65, and other cases from that jurisdiction. The Minnesota statute governing modification, however, by its terms, has application only to formal awards, and does not include voluntary agreements between the parties, as does section 48-142. But even if the Minnesota statute were identical with ours, it would still be our duty to think and reason for ourselves and to attempt to make our own construction,—rational, workable, and as much in harmony as possible with our previous decisions. Mere priority of decision must not be translated into exclusiveness in judicial wisdom.

It has been the contention of defendant that additional compensation for an increased disability should never be allowed to be recovered in any case, except where proceedings have been brought within one year from the date of the last compensation payment. Such a construction would result in many cases in an obvious injustice. Equitably, an increased disability, where compensation has been paid periodically for more than six months under a valid agreement or a formal award, must be treated as analogous to a latent injury and subject to the application of the limitation provision of the statute in the manner we have indicated above. In *Dunlap v. City of Omaha,* 131 Neb. 632, 269 N. W. 422, and *Kurtz v. Sunderland Bros. Co.,* 124 Neb. 776, 248 N. W. 84, as well as the other cases cited by defendant, the specific question here discussed was not involved, and there is nothing in the facts of these cases that is out of harmony with the principle we have announced, or that would require that plaintiff's right to recover for an increased disability be limited to one year from the date of the last compensation payment under the award.

No question is raised as to the sufficiency of the process employed to give the court jurisdiction over the state of Nebraska, and we accordingly shall not consider it.

The compensation court and the district court properly dismissed plaintiff's proceeding on the ground that it was barred as a matter of limitation.

AFFIRMED.

EDNA PETERSON ET AL., APPELLEES, V. DEPARTMENT OF ROADS AND IRRIGATION OF THE STATE OF NEBRASKA, APPELLANT.
289 N. W. 370

FILED DECEMBER 20, 1939. No. 30692

Eminent Domain. Where private property is condemned by the state for a public improvement and a warrant, evidencing the award of the appraisers, is deposited with the county judge of the county in which the land is situated, and he immediately turns over the warrant to the owners of the land at the direction of an engineer in charge of the project, and the evidence fails to disclose that the engineer was a duly authorized agent of the state for the purpose of adjudicating condemnation awards, and the county judge had knowledge, by letter, of the intention of the department of roads and irrigation to appeal; *held*, such action on the part of the county judge and the alleged agent of the state did not deprive the state of the right to appeal.

APPEAL from the district court for Webster county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed.*

Walter R. Johnson, Attorney General, and *Clarence S. Beck,* for appellant.

McNeny & Sprague, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and FALLOON, District Judge.

FALLOON, District Judge.

This action was brought for the condemnation of certain real estate for state highway purposes by the department of roads and irrigation of this state. The proceedings were commenced in the county court of Webster county. There is no dispute about the notices given, appointment of appraisers, or the return of their award on March 15, 1938. Notice of appeal was given by the department on April 19, 1938, and on May 6, 1938, transcript was filed in the district court for said county.

Warrant for $900, amount of the appraisers' award, was sent by department of roads and irrigation to and received

by the Webster county judge on April 28, 1938, and by him turned over to appellee landowners the next day. The letter from the department inclosing warrant contained the following paragraph: "It is our understanding that having paid the appraisers' allowance to you as county judge, we now have the right to use the land condemned, even though we are appealing this case to the district court."

The plaintiff landowners in the district court moved to dismiss the appeal as the matter involved had been settled and award paid and also because an appeal bond had not been filed as provided in section 26-711, Comp. St. 1929. Motion was sustained "on all grounds" and the case brought here for review by the appellant department of roads and irrigation. As to the above facts and record, there is no dispute.

Evidence was offered by the plaintiffs, appellees here, and the testimony of one of the appellees and of the Webster county judge taken and the original notice of appeal filed in the county court as well as the letter from the appellant department of date April 28, 1938, are preserved in the bill of exceptions. No testimony was offered by the defendant, appellant in this court. The evidence has been painstakingly read and proves that the appellees would not allow any construction done by the appellant on the premises in dispute until the award was paid into court. It further shows that an engineer by the name of Gould was in charge of project and that he told the county judge, after he received the award money, to turn it over to the appellees. It utterly fails to show any authority on behalf of the engineer to bind the appellant or to authorize the turning over of the award money, which should have remained on deposit in the office of the county judge.

Agency is never presumed but must be proved. The mere fact that the project engineer is an employee of the state is not of itself sufficient to bind the state. The burden of proof, when an agency is asserted, is on the person making the assertion. A governmental agency is not bound by one of its employees unless it manifestly appears that the latter

acted within the scope of his authority. The evidence in this case wholly fails to do this.

Section 26-711, Comp. St. 1929, provides that the party appealing in condemnation proceedings must give bond in 30 days, but section 20-2231, Comp. St. 1929, provides that, when the state or its agencies are a party, it is unnecessary. This first section was passed in 1927 and the latter at the special session in 1930. This question of whether a state or any of its official departments should give an appeal bond was passed on by this court in *State v. Odd Fellows Hall Ass'n*, 123 Neb. 440, 243 N. W. 616, and the requirement of an appeal bond by the state obviated.

There is no other requirement to obtain jurisdiction by the district court except to file within 60 days in the said court a certified transcript of the proceedings including all papers relating to or connected therein from the county judge. This was done.

The statute provides further, not for the purpose of an appeal, but that there may be no delay in the prosecution of work of public improvement, that the award may be paid to or deposited with the county judge, in which case the work is not delayed but may proceed. This deposit shall remain with the county judge until a final decision is had. This payment to or deposit of the award with the county judge does not deprive the condemnor of the right to appeal. See *Cleveland, C. C. & St. L. R. Co. v. Nowlin*, 163 Ind. 497, 72 N. E. 257, and *Chicago, S. F. & C. R. Co. v. Phelps*, 125 Ill. 482, 17 N. E. 769. Also, *Madisonville, H. & E. R. Co. v. Ross*, 126 Ky. 138, 103 S. W. 330.

The appellant did all that was necessary to perfect its appeal. The payment of the award into court was necessary to expedite the construction work, but added nothing to the right of appeal. While it would have been proper to have made warrant payable to the county judge, rather than to appellees, it makes no difference in the decision rendered. Courts will not read into a statute on appeal a requirement that is not there. The payment of the deposit to the appellees without adequate authority by the county

judge does not deprive the appellant of its right to be heard upon appeal. There is no competent evidence to prove that the appeal had been abandoned.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

OWEN FRANK, APPELLEE, V. TERRY CARPENTER ET AL., APPELLANTS.
289 N. W. 538

FILED DECEMBER 23, 1939. No. 30844.

1. **Taxation.** Matters which might have rendered an unconfirmed tax sale voidable in the scavenger suit on the ground of fraud cannot be made the subject of a collateral attack.
2. ———. Tax sale certificates in a scavenger proceeding may be surrendered for cancelation at any time, in order to clear the public records and give the effect of a redemption from the sale, even after the expiration of the time in which the purchaser can acquire title to the property. Comp. St. 1929, sec. 77-2129.

APPEAL from the district court for Scotts Bluff county: CLAIBOURNE G. PERRY, JUDGE. *Affirmed.*

Frank L. Glebe, Willard F. McGriff and *Mothersead & York*, for appellants.

Floyd E. Wright, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, MESSMORE and JOHNSEN, JJ.

JOHNSEN, J.

This case challenges the validity of the tax scavenger proceedings discussed in *Marker v. Scotts Bluff County*, p. 360, *post*, 289 N. W. 534, with respect to another piece of real estate. Most of the questions raised are settled by that decision.

Plaintiff sued defendant Carpenter for specific performance of a contract to purchase the property involved. Car-

penter set up as his reason for nonperformance that plaintiff had failed to discharge the tax liens against the property. The taxes involved were principally those for the years 1920 to 1927, inclusive, aggregating approximately $1,500, without accumulated interest. He asked that he be authorized to pay the taxes out of the balance of the purchase price, as far as possible, and that he be given judgment against plaintiff for any additional amount necessary to be advanced by him to discharge the liens. He further asked that Scotts Bluff county be impleaded as a defendant and be required to set up the tax liens against the property on behalf of itself and as trustee for the other interested governmental units. Scotts Bluff county filed a cross-petition alleging that, while the taxes in question had been included in the tax scavenger suit brought by the county attorney in 1928 (which is discussed in the *Marker* case), the proceedings had were void and the taxes were therefore still a lien against the property which it was entitled to have foreclosed. The trial court entered a decree in favor of plaintiff and dismissed the cross-petition of Scotts Bluff county. Defendants have appealed.

In this case the property involved was purchased by plaintiff's father, at the scavenger sale, on May 8, 1929, for the sum of $1, and a tax sale certificate was issued to him. No steps were ever taken to have the sale either vacated or confirmed, except that in November, 1932, the county treasurer, on his own motion and without notice to any of the parties, had the court enter an order authorizing him to cancel the taxes in question on his records, on the ground that they had been duly extinguished by the foreclosure proceedings. The tax sale certificate remained outstanding until March 15, 1939, when it was surrendered by the father to the county treasurer, with a letter stating, "I am sending you this Certificate of Tax Sale for cancelation under 77-2129 of the 1929 Statutes." Section 77-2129 provides that, where a certificate has been returned by the holder and canceled, "such cancelation shall have the effect of a redemption from such tax sale."

The foreclosure and the sale in the scavenger proceedings cannot be attacked in this suit, for the reasons which have been set out in the *Marker* case, unless they are utterly invalid. The county charges that the property was bid in by the father under a collusive agreement with the plaintiff, and that this, together with the nominal amount for which the property was purchased, constituted a direct fraud. Plaintiff and his father testified that there had been no conversation or agreement between them regarding the purchase of the property, although it was shown that plaintiff in turn had bid in some property which was owned by the father. It appears that prior to the sale the father had forwarded a check to the county treasurer with the request that some properties be selected and bids made for him by the county treasurer.

The situation does not have a particularly wholesome aspect, with the father and son, both of whom were delinquent in their taxes, purchasing each other's properties, and with the county treasurer undertaking to place a bid of $1 in the father's behalf upon a piece of the son's property, against which there existed $1,500 in taxes, without accumulated interest. But, even if the sale could be branded as collusive and fraudulent, it would still not be void, but merely voidable. A dollar has always been held to be a sufficient consideration in the eyes of the law to support a sale. This does not, of course, prevent the court, in scrutinizing a judicial sale, from taking into account the inadequacy of the sale price as one of the factors in determining whether the sale should be vacated or confirmed. But this matter, as well as any matters of conduct which may have tinged the sale, can only be considered by the court in a direct attack upon the sale proceedings. They cannot be raised in a collateral proceeding. In the absence of any attempt on the part of the county to vacate the sale in the scavenger proceedings, in the ten years that have elapsed, we must, for the purposes of this suit, accept it as valid.

It should perhaps be suggested, in connection with tax

scavenger proceedings throughout the state in the future, that the county attorney owes the duty of examining the sales and of taking prompt steps to attempt to vacate any sales where it appears that questionable practices have been indulged in to the probable prejudice of the public. The court will not hesitate to exercise its plenary equitable powers in such a situation. *Prudential Real Estate Co. v. Battelle*, 90 Neb. 549, 134 N. W. 161.

The county raises one other point that requires consideration. It contends that the holder of a tax sale certificate cannot surrender it for cancelation, so as to give it the effect of a redemption, after the expiration of the time limited for the acquiring of title. It argues that the father's failure to take title or to surrender his certificate before this right expired made the certificate a nullity. If the rights of a certificate-holder are to be deemed to have lapsed for all purposes, after the time has expired for acquiring title under the certificate (which we need not determine), the lapse would have to be held to operate primarily in favor of the property owner and not of the government. But whether the rights under the certificate in such a situation might still be enforced as a lien by an independent foreclosure in equity, or whether they have wholly expired, there is nothing in the statute, in either event, that prevents their surrender at any time for the purpose of clearing the public records and of giving "the effect of a redemption from such sale."

We are obliged to affirm the decree of the trial court.

AFFIRMED.

HENRY MARKER, APPELLEE, V. SCOTTS BLUFF COUNTY ET AL., APPELLANTS.

289 N. W. 534

FILED DECEMBER 23, 1939. No. 30846.

1. **Taxation.** A decree in a tax scavenger suit will not be held void at the instance of the plaintiff therein because the notice is not directed to "All Whom It May Concern," where those

owning or having an interest in the real estate involved have made no objection to the defect and have, on the contrary, ratified the proceedings by the assertion of rights under them.

2. ———. A sale in a tax scavenger suit is not void because the proof of notice thereof is not filed in the office of the clerk of the district court before the sale is held.
3. ———. A statutory provision that the holder of a certificate of tax sale in a scavenger suit may surrender it to the county treasurer with a request for its cancelation, and that such cancelation shall have the effect of a redemption from the tax sale, is not a provision for the release or commutation of taxes within the prohibition of section 4, art. VIII of the Constitution.
4. **Judicial Sales.** An unconfirmed judicial sale is not a nullity, and, as against a collateral attack, will be treated as valid for every purpose possible.

APPEAL from the district court for Scotts Bluff county: CLAIBOURNE G. PERRY, JUDGE. *Affirmed.*

Frank L. Glebe, Willard F. McGriff, Walter R. Johnson, Attorney General, and *Rush C. Clarke,* for appellants.

Morrow & Miller, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, MESSMORE and JOHNSEN, JJ.

JOHNSEN, J.

Plaintiff seeks to have it decreed that the lien of certain taxes upon 160 acres of land in Scotts Bluff county was extinguished by scavenger proceedings under article XX, ch. 61, Comp. St. 1922 (Comp. St. 1929, ch. 77, art. 21), and to have his title quieted against any further claim for such taxes on the part of the state, the county, and the school district. Defendants' contention is that the scavenger proceedings were a nullity, and the county, by cross-petition, prays that the lien of the taxes be confirmed and again foreclosed. From a decree in favor of plaintiff, the county and the school district have appealed.

The taxes involved were for the years 1919 to 1927, inclusive, upon 80 acres of the land, and for the years 1922 to 1927, inclusive, upon the other 80 acres. They totaled

approximately $975, without accumulated interest. In 1928 scavenger proceedings were instituted by the county attorney against a large number of tracts of real estate in Scotts Bluff county upon which the taxes were delinquent, including the two 80-acre tracts here involved, which were then owned by Grace I. Waters and Harry W. Drawbaugh, respectively. A decree of foreclosure was entered by the district court in such proceedings, and, at a sale held thereunder in May, 1929, R. G. Harvey bid in each of the 80-acre tracts here involved for $25, and had two certificates of tax sale issued to him. He later assigned one of the certificates to I. E. Adkins, and, in November, 1930, he and Adkins, after paying the 1928 and 1929 taxes upon the property, surrendered the certificates to the county treasurer, for cancelation under section 6132, Comp. St. 1922 (Comp. St. 1929, sec. 77-2129). No formal order of confirmation was ever entered by the court. An order was entered in November, 1932, on motion of the county treasurer, without notice, however, to any of the parties, authorizing him to cancel the taxes in question on his records, on the ground that they had been duly extinguished by the foreclosure proceedings.

Section 6132, Comp. St. 1922 (Comp. St. 1929, sec. 77-2129) provides: "Whenever the owner or holder of any certificate of tax sale shall return the certificate to the county treasurer and request a cancelation of such certificate, the same shall be taken up by the county treasurer and preserved, and an entry shall be made upon the tax record that the certificate has been returned and canceled and such cancelation shall have the effect of a redemption from such tax sale: *Provided,* no cancelation of premium sale certificates shall be made until the premium period shall have expired."

Plaintiff, who acquired title through mesne conveyances on the part of the then record owners, contends that the surrender of the tax sale certificates by the holders, with the intention that they should be canceled, operated, under the statute, as a redemption from the sale and an extinguishment of the lien. Defendants argue that the scavenger pro-

ceedings were ineffectual to extinguish the lien, for the following reasons: (1) The published notice was not in the exact language of the statute and so was insufficient to give the court jurisdiction to enter a decree. (2) The sale was a nullity because the proof of notice was not filed in the district court until after the sale was held. (3) The surrender of the certificates by the holders operated merely to vacate the sale, and not as a redemption and a cancelation in favor of the landowners, since such a construction would make section 6132 a means of releasing taxes, which the legislature is prohibited from doing under section 4, art. VIII of the Constitution. (4) The sale could not be given any judicial recognition in this proceeding, because it had never been confirmed.

The contention that the published notice was insufficient to give jurisdiction rests on the fact that it uses the words "Notice—You will take notice," etc., instead of being directed to "All Whom It May Concern," as provided in section 6110, Comp. St. 1922 (Comp. St. 1929, sec. 77-2107). Whatever merit, if any, this contention might have, if made by the owner or one having an interest in the property and no knowledge of the proceedings, it is clear that it is without force in the mouth of the plaintiff therein, where the only party against whom it can possibly be said to be defective, as a basis for imparting notice, recognizes its sufficiency and claims rights under the proceedings that are predicated on it. A seemingly technical variance from the provisions for notice in tax proceedings may under certain circumstances constitute such a substantial defect as not to impart constructive notice, but where the parties whom it is sought to bind by the notice make no objection to the defect, and, on the contrary, ratify the proceedings had, by the assertion of rights under them, such provisions will not be made ritualistic, in order to enable the party by whom the proceedings were instituted to escape some of the subsequent effects of them. Section 6148, Comp. St. 1922 (Comp. St. 1929, sec. 77-2145) expressly provides: "Throughout all of the proceedings it shall be the duty of the county (court)

to disregard all informalities or irregularities which may have occurred from the inception of every state, county or city general tax up to final confirmation of sale."

The contention that, since the proof of notice of sale was not filed in the office of the clerk of the district court until after the sale was held, the sale was void is also sufficiently answered by section 6148, just quoted. Section 6121, Comp. St. 1922 (Comp. St. 1929, sec. 77-2118), merely requires that such proof "shall be presented, with the affidavit attached, by the county treasurer to the clerk of the district court, and * * * shall be filed and preserved as a part of the records of the court." The time of filing is not specifically prescribed, and there is nothing that makes such filing a condition precedent to the right to hold the sale. Where the notice has been duly published, failure to file the proof thereof before the time of the sale would be at most a mere irregularity, which, under the statute, would have to be ignored.

Defendants' next contention is that the surrender of the certificate by the holders thereof, in 1930, did not operate to redeem the property from the sale and to extinguish the lien of the decree, but only to vacate the sale. Section 6132, which has been set out above, provides that the return of a tax sale certificate to the county treasurer, with a request for cancelation, "shall have the effect of a redemption from such tax sale." The term redemption, in a literal sense, means the act of buying back or repurchasing. Webster's New International Dictionary (2d ed.); *Murphy v. Casselman*, 24 N. Dak. 336, 139 N. W. 802. In law, it is applied specifically to the buying back or regaining of one's property after it has been sold. Ballentine's Law Dictionary, 1101. The statutory provision that a return of the tax sale certificate with a request for cancelation shall have the effect of a redemption from the tax sale cannot, therefore, by any ordinary construction, be held to mean that it merely operates to vacate the sale and to restore the lien of the decree. It must be held to mean what it in plain terms says, that such procedure shall have the effect of a redemption

from the tax sale. The property necessarily in this situation is not further subject to the lien of the decree.

Defendants argue that this construction makes section 6132 violative of section 4, art. VIII of the Constitution, which prohibits the legislature from making provision for the release or commutation of taxes. There is a distinction, however, between the release of taxes as such, and the extinguishment of the lien of a decree, into which they have been merged, by judicial sale proceedings. To the layman this may seem a technical distinction, but in law it is one that nevertheless soundly exists. Thus, it has been said that "a redemption of the land is not a payment of the tax." *Lindsay v. Fay*, 28 Wis. 177. And so, where taxes have been merged into a decree, and a public sale has been held, provisions may validly be made by the legislature for a redemption and a satisfaction of the decree, which could not be made if they were applied directly to the taxes themselves.

In *Woodrough v. Douglas County*, 71 Neb. 354, 98 N. W. 1092, the court said: "In a foreclosure the liens do not continue as encumbrances on the land, but by operation of law they are extinguished. In the proceeding to foreclose tax liens provided for in this act the liens are extinguished, and are not released either by the legislature or by the voluntary act of any public officer acting under authority from that body. * * * The judicial sale of property under a decree of foreclosure, for what it will bring, although it be less than the amount of the taxes assessed and delinquent against it, cannot be said to be a commutation of taxes within the Constitution." The rights of the public are sufficiently protected by an unimpeachable sale, and the provision which the statute makes for increased or premium bids. Where the highest amount which the property will bring has finally become settled, the public has no great concern about how the purchaser intends to realize upon the transaction. Its interest lies in obtaining as much revenue as possible from a fair public sale, and in getting the property back onto the tax rolls as a producer of current revenue. Where no bad faith is involved in the proceedings, it can

make no difference to the public, therefore, whether the purchaser is required to complete his title before he will be permitted to sell the property back to the former owner, or whether he is permitted to make a deal with the owner, after the sale and before issuance of treasurer's deed, by which the latter is enabled to retain the title and to discharge the lien. The fact that the legislature has made provision for the surrender of a tax sale certificate for cancelation, with the legal effect of a redemption from the sale, without requiring the holder to take title to the property in order to extinguish the lien of the certificates and the decree, does not make the statute an attempt to release or commute taxes.

Defendants' final contention is that the sale proceedings and the certificates issued thereunder cannot be given judicial recognition in this case because the sale was never confirmed. While a judicial sale does not become final or complete until it has been confirmed (*Smith v. Carnahan*, 83 Neb. 667, 120 N. W. 212), it is not a nullity merely because it lacks confirmation. 35 C. J. 44. Like all judicial proceedings, it is presumptively valid, and it must be so treated for every purpose possible. In a scavenger proceeding, an unvacated sale is valid for every purpose, without confirmation, except the termination of redemption rights and the obtaining of title. In the absence of any attempt to vacate it in the original proceedings, it must be recognized as valid for the purposes of this suit. Without a direct attack upon it, it is proper in this collateral proceeding to assume a conclusive acquiescence in it. Indeed, there is authority to the effect that failure to file objections to a sale may in some circumstances constitute such a ratification or acquiescence as to dispense with the necessity for a confirmation or to give rise to the presumption that an order of confirmation was made, of which the evidence has been lost. 2 Freeman, Executions (3d ed.) sec. 304a. In any event, while, of course, the surrender of certificates in connection with a sale that is subsequently vacated cannot operate as a valid redemption, such a surrender must, in the

absence of any attempt to vacate the sale, be treated as a valid redemption for purposes of this suit.

The decree of the trial court was proper under the circumstances.

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1940

RALPH E. AREHART, APPELLANT, V. SCHOOL DISTRICT NO. 8, HITCHCOCK COUNTY, APPELLEE.

289 N. W. 540

FILED JANUARY 5. 1940. NO. 30725.

1. **Schools and School Districts.** The power of a school board to employ a teacher and to transact the business of the school district for school purposes implies the power to dismiss him for sufficient cause before expiration of the term of employment, especially where the contract provides that he shall not be entitled to compensation after dismissal for cause.
2. ———. A school board is a public body empowered by law to transact the business of the school district for school purposes and in that capacity the members thereof act as representatives of the district and not as individuals.
3. ———. In summoning a school-teacher for misconduct, in inquiring whether he is performing his contract and in determining his fitness for continued service, a school board acts in a quasi-judicial capacity and its dismissal is generally upheld after a hearing unless shown by the teacher to be fraudulent or otherwise without justification.
4. ———. In absence of a statute authorizing the dismissal of a school-teacher at the pleasure of the school board, a dismissal terminating the contract of employment without sufficient cause may be redressed in an action by him against the school district to recover damages for breach of the contract.
5. ———. A fist fight in the office of a superintendent of schools in a public school building by the superintendent and a high-school teacher in a subordinate position *held* sufficient to justify the school board in dismissing the former for cause, after notice and hearing.

APPEAL from the district court for Hitchcock county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Carl H. Swanson and *J. F. Ratcliff*, for appellant.

Butler, James & McCarl, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, CARTER, MESSMORE and JOHNSEN, JJ.

ROSE, J.

This is an action by Ralph E. Arehart, plaintiff, to recover from School District Number 8, Hitchcock county, defendant, $1,800 with interest for breach of his contract of employment as teacher and superintendent of schools.

Plaintiff entered into a written contract with defendant March 20, 1936, to serve as superintendent of defendant's schools for two years commencing September 7, 1936, at an annual salary of $1,800, and acted in that capacity for one year. The school board prevented him from performing the duties of his employment for the second year. These facts were pleaded at length in the petition in which it was alleged further in substance that plaintiff was a duly-qualified teacher, was ready and willing to comply with the contract during the second year and offered to do so. A copy of the contract is attached to the petition and provides that plaintiff shall not be entitled to compensation after his dismissal for cause.

The answer of defendant to the petition admits the execution of the contract and that the school board prevented plaintiff from teaching pursuant to its terms between September 6, 1937, and May 6, 1938, and alleges in effect that plaintiff and E. C. Pancoast, a teacher in defendant's high school, engaged in a fist fight in the superintendent's office in the school building; that the best interests of the schools required plaintiff's dismissal; that on April 5, 1937, at a regular meeting, plaintiff and Pancoast were summoned to appear before the school board at a hearing for the purpose of determining whether or not their misconduct required their dismissal in the interest of the public schools;

that they both appeared before the board and were accorded a fair and open hearing at which each told his story; that at the conclusion of the hearing the board unanimously determined that their services should be terminated at the end of the school year in May, 1937; that they were requested to resign, but refused to do so, and plaintiff was prevented by the board from teaching in defendant's district for the school year beginning September 6, 1937.

In a reply to the answer plaintiff admitted that an altercation between him and Pancoast occurred in the superintendent's office in the school building March 15, 1937, but alleged that Pancoast made an unlawful assault on plaintiff who engaged in the altercation only to the extent necessary to self-defense. Plaintiff alleged further in his reply that after the meeting April 5, 1937, the minutes of the board recited:

"As a result of fight in professor's office between R. E. Arehart and Edw. Pancoast the board heard Mr. Arehart's side of story and then Mr. Pancoast's side of story. After hearing both sides of story the board decided unanimously that both teachers should resign at end of school year."

The reply admits also that plaintiff and Pancoast were summoned before the board April 5, 1937, and that both then appeared and that the board determined that the services of plaintiff should be terminated at the end of the school year in May, 1937, but alleged that such action was arbitrarily taken because of the bias, unfairness and prejudice of the board, and was without authority of law and void.

Upon a trial of the action for damages on the issues raised by the pleadings, the district court excused the jury and ordered a dismissal. Plaintiff appealed.

On appeal plaintiff argues that the action of the school board in dismissing plaintiff before his term of employment expired was not final; that just cause for the dismissal was a question for the court; that the burden of proving justifiable cause for such action was on the school district; that in absence of such proof plaintiff is entitled to damages

for the wrongful termination of the contract. In connection with these propositions, plaintiff invoked the following rule:

"If a teacher duly employed in the public schools for a specified period is dismissed by the school board prior to the expiration of the term of employment, without being shown to be incompetent, or for other good reasons, the district is liable therefor." *Wallace v. School District*, 50 Neb. 171, 69 N. W. 772.

Plaintiff proved his qualifications to teach when employed. He proved also the making of the contract and a year's service pursuant to its terms. His testimony shows that he was present at the board meeting when requested to resign; that he appeared before the board at the hearing; that he told his story; that Pancoast appeared and told his side of the controversy; that the board requested both to resign.

There is no statute permitting the school board to dismiss duly-employed teachers at its own pleasure, but the power of the board to employ a teacher and to transact the business of the school district for school purposes implies the power to dismiss him for sufficient cause before expiration of the term of employment. *Bays v. State*, 6 Neb. 167; *Wallace v. School District*, 50 Neb. 171, 69 N. W. 772; *Baird v. School District*, 41 Wyo. 451, 287 Pac. 308, and cases cited therein. The contract provides by its own terms that plaintiff shall not be entitled to compensation after his dismissal for cause. This is recognized by both the law and the contract. Sufficient cause for dismissal by the school board was shown by plaintiff in his reply. While he called the fight an "altercation" in his reply and alleged that he participated therein only to the extent necessary to defend himself from an unlawful assault, he also pleaded in his reply a recital in the minutes of the board, after it heard both combatants, to the effect that they had a fight in "professor's office." The record contains no evidence whatever that plaintiff participated in the fight only to the extent necessary to protect himself from an unlawful assault

or that the board in dismissing him was prompted by prejudice, bias, caprice, fraud or by any other improper motive. The school board is a public body empowered by law to transact the business of the school district for school purposes. The members act in a representative capacity, not as individuals. Compulsory attendance of children of school age is required. Preparation for citizenship and right living is a mission of the public schools under the existing system of government. Whether misconduct of a teacher unfits him for such service is in the first instance a question for the school board having general control of school affairs in the interest of the public. In summoning a school-teacher for misconduct, in inquiring whether he is performing his contract and in determining his fitness for continued service, a school board acts in a quasi-judicial capacity and its dismissal is generally upheld after a hearing unless shown by the teacher to be fraudulent or otherwise without justification. In absence of a statute authorizing the dismissal of a teacher at the pleasure of the school board, a dismissal terminating a teacher's contract without sufficient cause is not beyond judicial scrutiny, as held in *Wallace v. School District,* 50 Neb. 171, 69 N. W. 772.

Plaintiff, the superintendent, admitted in his reply, and the evidence shows without contradiction, that he and Pancoast, a high-school teacher, had a fist fight in the office of the superintendent. The school building and the office of the superintendent were not constructed and equipped by the public for fist fights. Plaintiff used these public school facilities for an unbecoming private purpose inimical to the best interests of the public schools. The fist fight evidenced a lack of cooperation between the superintendent and a teacher in the high school and a want of discipline—important factors in school management. The example and influence of the fist fight were well calculated to lessen the respect of pupils for their teachers. Of course a different question would have been presented had the superintendent proved that he made only an effort to repel an unprovoked

and unlawful assault upon him by a teacher in a subordinate position, as pleaded in his reply.

As disclosed by the pleadings, the facts shown by the undisputed evidence and the law applicable thereto, plaintiff did not make a case for compensation after he was discharged. The trial court, therefore, did not err in dismissing the action.

AFFIRMED.

IN RE ESTATE OF MYRTLE SHEERER.
JULIA DONOHUE, APPELLANT, V. HARVEY E. SHEERER, APPELLEE.

289 N. W. 529

FILED JANUARY 5, 1940. No. 30690.

1. **Executors and Administrators.** "In a petition to the county court for administration on the estate of a deceased person, the only averments essential to the jurisdiction of the court are, that such person died intestate, and was at the time of his death a resident or inhabitant of the county where the petition is filed; or, in case he was at the time of his death a nonresident of the state, that he left an estate in such county to be administered." *In re Estate of Pollard*, 105 Neb. 432, 181 N. W. 133.
2. ———. In such a case, where a petition has been filed and statutory notice has been duly given, and the objector has, in addition, actual knowledge of the pendency of the proceeding in ample time to have filed objections thereto prior to the hearing therein, but failed to do so until more than one year after the appointment of an administrator was made, no objection to the jurisdiction of the court to appoint such administrator can be predicated upon the fact that the petitioner was not legally married to the deceased or has no beneficial interest in the estate.
3. ———. After thirty days have elapsed, following the death of the deceased, no right of preference exists in favor of the widow or next kin of deceased, or the persons designated by them for appointment of administrator of the estate of deceased.

APPEAL from the district court for Lancaster county: ELLWOOD B. CHAPPELL, JUDGE. *Affirmed.*

Lloyd E. Chapman, for appellant.

Joseph J. Cariotto, contra.

Heard before SIMMONS, C. J., EBERLY, PAINE, MESSMORE and JOHNSEN, JJ., and KROGER and ELLIS, District Judges.

EBERLY, J.

This is an appeal by Julia Donohue from a judgment of the district court for Lancaster county, entered in the above entitled cause on November 8, 1938, which reversed and set aside a final order of the county court entered in this case, then pending therein, on May 13, 1938. By such order of May 13, 1938, it was adjudged by the county court "that Harvey E. Sheerer be and he hereby is removed as administrator of the above estate, and that the letters of administration heretofore granted herein to the said Harvey E. Sheerer be and the same hereby are revoked and annulled." The judgment of the district court, in effect, fully restored to Sheerer his rights as administrator duly appointed of the estate of Myrtle Sheerer, deceased.

The facts out of which this litigation developed include the following, viz.: Myrtle Sheerer, also known as Myrtle Dodd, for many years at and prior to her death, was an inhabitant and resident of Lincoln, Nebraska. She died in Lincoln, Nebraska, on February 5, 1937, and at the time of her death was the owner of $1,450 in cash and deposits in financial institutions, all located in Lincoln, Nebraska, and also an insurance policy of $1,000. In addition, she owned certain Iowa lands which had been purchased by her, the fee simple title of which was vested in deceased as "Myrtle Dodd Sheerer" by the terms of the deed of conveyance which she in her lifetime had accepted and received; also, her undivided interest in 76 acres of land in Iowa inherited from her deceased father's and mother's undivided estate, and the decree of distribution therein vested in her by the name of Myrtle Dodd Sheerer, which appears to have been done at her direction.

From appellant's petition filed in the county court and the proceedings thereon, upon which the action to remove Sheerer as adminstrator is based, we gather that on or about

February 8, 1937, Harvey E. Sheerer filed a petition in the county court of Lancaster county stating that he was the widower of Myrtle Dodd Sheerer (who had departed this life on February 5, 1937, a resident of Lincoln, Nebraska, owning personal property therein), and designating her as Myrtle Sheerer, and praying that letters of administration be granted to him upon the property of said deceased. The sufficiency of this petition so far as shown upon its face is unchallenged by appellant (see *Larson v. Union P. R. Co.*, 70 Neb. 261, 97 N. W. 313), and neither is the sufficiency of the notice of the pendency of this petition for appointment of an administrator in any manner questioned herein. In addition, a letter from the attorney at Lincoln, Nebraska, employed to settle up this estate, which was dated February 15, 1937, properly addressed to appellant at Stanton, Iowa, and put in the mail at Lincoln, Nebraska, on February 15, 1937, at 12 p. m., and received by her in due course of the mails, was produced by her and introduced in evidence at the trial in the district court. The first paragraph of this letter reads as follows, viz.:

"Dear Mrs. Donohue: You will want to know that the hearing on the petition for the appointment of an administrator in the matter of your sister's estate has been set by the county judge for March 8, 1937, at 9 o'clock a. m. It will not be necessary for you folks to come to Lincoln to attend this hearing, unless you want to. The court will grant letters of administration to Mr. Sheerer, upon which he will file his oath and his bond as administrator. This being done he will have the authority to collect and assemble the assets. An inventory can be filed at once. I'll send you copies of all court findings. No doubt you have the copy of the petition filed last week. I handed one to Mr. Donohue." "Mr. Donohue" referred to in this letter, the record indicates, was her then husband.

On the 8th day of March, 1937, it appears, the county court of Lancaster county, at a hearing duly had pursuant to proper notice, granted the prayer of Sheerer's petition, and issued letters to him and he thereupon duly qualified, as

provided by law, and entered on the duties imposed by the appointment. On March 10, 1938, appellant, Julia Donohue, filed in this cause in the county court of Lancaster county her petition to remove the administrator and revoke letters of administration issued to Harvey E. Sheerer. The sole ground for such removal, set forth in said petition, is based upon a statement alleged to have been contained in Sheerer's original petition for appointment as administrator of the estate of Myrtle Sheerer, deceased, that "he was the widower of the said Myrtle Dodd (therein designated as Myrtle Sheerer)." As to this statement, appellant alleges that it is "wholly false and untrue," "and the said Harvey E. Sheerer is but an interloper and pretender; that no marriage was ever solemnized between the said Harvey E. Sheerer and the deceased by any person authorized by law to solemnize marriages, and no license has ever been obtained for such a marriage." Appellant, in effect, in this pleading alleges that this act constitutes a fraud, and because thereof the county court was without jurisdiction to grant such letters of administration; that the letters granted were procured by fraudulent representations and are wholly null and void.

To this petition Harvey E. Sheerer filed his answer consisting of, (1) a general denial, (2) affirmative allegations that a valid marital relation existed between himself and the deceased at the time of her death.

It will be noted that maladministration by Sheerer as administrator is not alleged by appellant.

On hearing in the county court of Lancaster county on May 13, 1938, that court determined, viz.:

"1. That there never was any marriage of the said Harvey E. Sheerer to the deceased.

"2. That the letters of administration heretofore issued to the said Harvey E. Sheerer herein on or about March 9, 1937, are wholly null and void and should be revoked and annulled.

"3. That the deceased was an unmarried woman, and that the names, ages, and residences of the sole and only heirs at law of said deceased are as follows:

Name	Age	Residence	Related to Deceased
Julia Donohue	49	Stanton, Iowa	Sister
Frank Dodd	52	Red Oak, Iowa	Brother
Ernest Dodd	42	Unknown at the present time	Brother."

And the county court adjudged "that Harvey E. Sheerer be and he hereby is removed as administrator of the above estate, and that the letters of administration heretofore granted herein" be "revoked and annulled." On appeal by Sheerer from this order, and on trial *de novo* in the district court, that court reversed and set aside this judgment of the county court, and adjudged that Harvey E. Sheerer was entitled to remain and continue as administrator of the said estate.

The real question which was presented to the county court at the time of the entry of its order of May 13, 1938, is not who succeeded to or inherited the property of the deceased, but who, under the conditions existing at the date of making that order, was entitled to administer or continue to administer the same. No matter what may be the ultimate determination of the disputed marital relation, the appointment as originally made and the administration proceedings following are not "void." We really have here presented only a question of who is entitled to the fees and commission.

The deceased was a resident of Lancaster county at and prior to the date of her death. Her personal property was located here. A petition in due form was properly filed; statutory notice was given; and actual knowledge of the proceedings was fully and fairly communicated to the complaining party long prior to the consideration of the petition and the making of the appointment of the administrator prayed for therein. Our county court is a court of record. Its orders, decrees and judgments can be known by their record alone, which necessarily imports absolute verity and can neither be questioned nor falsified; from which it

follows that the county court is bound by the decree it renders, and can neither change nor disregard its orders and judgments after the term at which they were rendered, except strictly in the manner provided by statute and the law of the land. 1 Woerner, American Law of Administration (3d ed.) 493, sec. 146, note 3.

The general principles which seem to be controlling in questions of jurisdiction, as well as reasons sustaining the same, are well epitomized in the following:

"Jurisdiction is obtained over the estates of decedents, wards, bankrupts and insolvents, by the filing of a petition containing certain allegations, with a prayer, express or implied, for the appointment of an officer to take charge of the estate. This officer is variously called an administrator, executor, curator, guardian, tutor, assignee, trustee, commissioner or receiver. The duties of all being the same —namely, to settle and distribute the estate under the orders of the court—the principle governing the validity of their appointment, when collaterally assailed, must be the same in all. The statutes generally prescribe the order of appointment among the relatives or creditors; but, on principle, a deviation from such order will not make the order appointing void, for two reasons—namely, First: The subject-matter involved is the rights of the various persons in the estate. At present, we assume those persons to be in court, and the *power to declare and fix their rights* constitutes the jurisdiction over the subject-matter. The appointment of persons to carry out the orders and directions of the court in the process of settling those rights, is simply a part of the procedure necessary to conduct the proceedings to a final conclusion in an orderly manner, *where the jurisdiction is unquestionable.* Second: Whether A, B, or C, is thus appointed to assist the court, in no manner affects the merits of the cause, and courts should hesitate long before holding their proceedings void, to the detriment of innocent persons, on account of non-meritorious matters. These officers are merely agents or servants of the court, like the clerk and sheriff, appointed to carry out

and enforce its orders. They have no actual interest in the matter. By being appointed or recognized by the court, they become officers *de facto*, with the power of the state at their command, the same as the clerk or sheriff, and, on principle, no error in their appointment or removal can make the subsequent action of the court void." Van Fleet, Collateral Attack on Judicial Proceedings, 615.

In line with the principles thus stated, it has been held that the appointment of an administrator on insufficient or illegal evidence is not void. *Brubaker v. Jones*, 23 Kan. 411; *Stackhouse v. Zuntz*, 36 La. Ann. 529; *Brown v. Landon*, 30 Hun, 57, affirmed in 98 N. Y. 634.

Also, it has been held that the appointment of the wrong person, such as a nonresident, or a stranger before the widow had renounced her right, or an alien, as administrator, is not void, and his official acts prior to removal remain binding thereafter. *Brubaker v. Jones*, 23 Kan. 411; *Emery v. Hildreth*, 2 Gray (Mass.) 228; *Pick v. Strong*, 26 Minn. 303, 3 N. W. 697; *Garrison v. Cox*, 95 N. Car. 353; *Ramp v. McDaniel*, 12 Or. 108, 6 Pac. 456; *Semine v. Semine*, 2 Lev. (Eng.) 90; *Wilson v. Packman*, 1 Cro. Eliz. Part 1, 459 (38 Eliz.); *Hobson v. Ewan*, 62 Ill. 146; *Martin v. Tally*, 72 Ala. 23; *Maybin v. Knighton*, 67 Ga. 103; *Lyle v. Siler*, 103 N. Car. 261, 9 S. E. 491; *Berney v. Drexel*, 12 Fed. 393.

So, where the statute provided that letters of administration should issue to the widow, or to a person she might select, the appointment of such person chosen by the alleged widow was not void because she had another husband living and was not the lawful widow. *Francisco v. Chicago, M. & St. P. Ry. Co.*, 35 Fed. 647.

The approved practice on this subject in this state appears to be in harmony with the principles above enunciated. As to preferential right of appointment as administrator our statute prescribes: "First: The widow, or next of kin, or both, as the judge of probate may think proper, or such person as the widow or next of kin may request to have appointed, if suitable and competent to discharge the trust. Second: If the widow, or next of kin, or the persons selected

by them, shall be unsuitable or incompetent, or if the widow or next of kin shall neglect, for thirty (30) days after the death of the intestate, to apply for administration, or to request that administration be granted to some other person, the same may be granted to one or more of the principal creditors, if any such are competent and willing to take it. Third: If there be no such creditor competent and willing to take administration, the same may be committed to such other person or persons as the judge of probate may think proper." Comp. St. 1929, sec. 30-314.

It will be noted that the "30-day preference" is *eo nomine* accorded to the widow only, but she shares this right with the "next of kin." The widower has no preference as to appointment of administrator of his wife's estate unless embraced in the statutory phrase "next of kin." The primary meaning of the term the "next of kin" of a decedent is the persons nearest in degree of blood surviving him. Query: Does the term "next of kin" of a deceased wife, as employed in this statute, embrace or include her husband, and if the husband is not of the "next of kin," what materiality may be attributed to the allegation in Sheerer's original petition for appointment on which appellant predicates her right of relief in the instant case?

Waiving the question suggested, as a résumé of the facts here involved, we note that the deceased departed this life on the 5th day of February, 1937; that Sheerer was appointed administrator by an order entered by the county court of Lancaster county on the 8th day of March, 1937, more than thirty days after the death of the deceased; and thereafter no objection was made thereto by appellant or the next of kin, or any creditors of deceased, and no person selected by appellant or any other person interested in said estate was presented for appointment as administrator thereof to the probate court of Lancaster county until on March 10, 1938, thirteen months and five days after the death of deceased, and more than a year after the appointment and qualification of Sheerer as such administrator.

We are committed to the view that after the thirty days

have elapsed, following the death of the deceased, no right of preference exists in favor of the widow or next of kin of the deceased, or the persons designated by them for appointment of administrator of the estate of such deceased. *Atkinson v. Hasty*, 21 Neb. 663, 33 N. W. 206; *Spencer v. Wolfe*, 49 Neb. 8, 67 N. W. 858.

The opinion of this court in *In re Estate of Pollard*, 105 Neb. 432, 181 N. W. 133, is illuminative. Lester S. Pollard died November 14, 1918, leaving surviving him as his only heirs two minor children, aged, respectively, 8 and 6 years. His wife had died a few days previous. On November 27, 1918, John C. Pollard, neither of the next of kin nor an heir of deceased, filed a petition in usual form praying for his own appointment as administrator. The county court gave notice of the pendency of the petition, and fixed December 23, 1918, as a day for hearing. On December 20, 1918, Amanda Forsythe Murray, the maternal grandmother of the minor children, filed objections to the petition and to the appointment of John C. Pollard, which included a challenge to the jurisdiction of the county court to appoint an administrator on the petition of John C. Pollard, for the reason that he was neither the next of kin or a creditor, and also that his petition was filed within thirty days next following the death of the deceased. These questions were finally presented to this court on appeal. We held the filing of the petition for appointment of administrator by Pollard within thirty days next following the death of the deceased, proper, and determined that, "In such case, no objection to the jurisdiction of the court to appoint an administrator can be predicated upon the fact that the petitioner has no beneficial interest in the estate." This court, under the facts in that case, denied Mrs. Murray relief, and sustained the appointment.

In view of the authorities cited and discussed, it follows that the county court of Lancaster county had actual and ample jurisdiction to enter its order of March 8, 1937, appointing Harvey E. Sheerer as administrator of the estate of Myrtle Sheerer, deceased. Such appointment was not

void. Indeed, at least after the conclusion of the term of the county court ending April 30, 1937 (Comp. St. 1929, sec. 20-2009), its order or judgment so entered was binding upon itself as well as against all the world. *Stone v. Jensen*, 118 Neb. 254, 224 N. W. 284.

True, in Nebraska, by statute (Comp. St. 1929, secs. 20-2001, 20-2009), and by virtue of inherent powers possessed independent of statute, upon proceedings being properly instituted therein, county courts possess power to vacate such proceedings when procured by fraud. This necessarily involves an affirmative proceeding equitable in its nature, with accompanying pleadings, supported by proper proofs, sustained by competent evidence, which clearly establish the material fraud charged. *In re Estate of Kelly*, 103 Neb. 524, 175 N. W. 653.

In these proceedings, the following principles are applicable and controlling, viz.:

"Fraud is never presumed but must be clearly proved by the parties pleading it and relying upon it." *Fritsche v. Turner*, 133 Neb. 633, 276 N. W. 403. See *Saffer v. Saffer*, 133 Neb. 528, 274 N. W. 479; *Hampton v. Webster*, 56 Neb. 628, 77 N. W. 50; *Kernan v. Modern Woodmen of America*, 120 Neb. 333, 232 N. W. 590.

In a fraud action, the burden of alleging and proving the existence of the elements thereof is upon the party seeking relief from fraud. *Leichner v. First Trust Co.*, 133 Neb. 170, 274 N. W. 475.

The record in the instant case discloses that the sole allegation contained in appellant's petition for the removal of Sheerer as administrator, which charges him with fraud, is the inclusion by him in his original petition for appointment as such, of the statement "that the said Harvey E. Sheerer was the widower of said Myrtle Dodd (therein designated as Myrtle Sheerer)." This, appellant charges is "wholly false and untrue." No other fraud or fraudulent representation is charged. Does this amount to a legal fraud, a material fraudulent representation? A false representation "must relate to a matter material to the

transaction involved." 26 C. J. 1103. It admittedly constituted no essential part of the pleading in which it was incorporated, and had it been omitted the omission would in no manner have affected the validity of the petition involved. Then too, the record discloses that the sole complainant in this action had been furnished a copy of this petition long prior to the hearing thereon on March 8, 1937, and had been fully advised of the impending appointment of Harvey E. Sheerer on the date last named in ample time to have presented proper objections thereto. In addition, she then had full knowledge of the alleged facts as to the marital relations existing between Sheerer and her deceased sister, upon which she seeks to sustain her present attack upon the appointment then made. She offered no objection then whatever, permitted the appointment of the administrator to be made unopposed, the administrator to qualify, and the administration of the estate to proceed in the usual course. Her first objection is voiced and first claim made on March 10, 1938. Even if it be conceded *arguendo* that her objection, if timely made, might have possessed merit, it is too late now. The entire situation, in view of the actual issues here presented, invokes the application of the equitable maxim, that "equity aids the vigilant, not those who slumber on their rights." By the application of this maxim to the solution of controversies, courts have protected one who by superior diligence has obtained a legal advantage, or by denying relief to one whose danger was created by his own neglect. 21 C. J. 193.

In addition, a careful examination and consideration of the competent evidence of the entire record, especially in view of the acts and business transactions of the deceased, which were evidenced by writings executed in her lifetime, inevitably lead to the conclusion that the allegations set forth in the petition of Harvey E. Sheerer as to the marital relations existing between himself and the deceased, Myrtle Sheerer, at and prior to her death, were made honestly and in good faith, and thus believed by him to be true. We are committed to the view that fraud will not be imputed where

circumstances and facts upon which it is based may be consistent with honesty of purpose. *Clemens v. Brillhart*, 17 Neb. 335, 22 N. W. 779.

It follows that the original jurisdiction to make the appointment of March 8, 1937, is unassailable; that on the charge of the alleged fraud the complainant, Julia Donohue, has wholly failed to sustain the burden of proof. The county court erred in the entry of its order of May 13, 1938, removing Harvey E. Sheerer as administrator and canceling his letters of administration and appointing his successor. This order of May 13, 1938, is hereby reversed, set aside, canceled and annulled, and Harvey E. Sheerer will be fully reinstated in his office as administrator and continue the administration of said estate in due course of law.

The judgment of the district court, in so far as consistent with the findings and judgment here entered, is approved. The action is thereupon remanded, with directions to the district and the county courts for further proceedings in harmony with the determination here made. Costs of the appeal are to be taxed to appellant.

AFFIRMED.

GEORGE E. PARISH, APPELLANT, V. COUNTY FIRE INSURANCE COMPANY, APPELLEE.

289 N. W. 765

FILED JANUARY 5, 1940. No. 30695.

Appeal. Where, on appeal, a reversal is entered in this court, if the record discloses that at the first trial the facts in issue have not been fully developed, or definitely settled, or may be said to be obscure, indefinite, uncertain, or otherwise unsatisfactory, though indicating that the party aggrieved has sustained actual damage, the trial court, upon remand, in absence of specific directions to the contrary, will accord to the litigants a retrial of the cause of action generally.

APPEAL from the district court for Douglas county: JOHN W. YEAGER, JUDGE. *Reversed.*

George Evens, for appellant.

Ramsey & Welpton, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and FALLOON, District Judge.

EBERLY, J.

This is an action upon an insurance policy to recover damages to a house, alleged to have been caused by cyclone, tornado, windstorm and hail, in the sum of $2,000, occurring on the 17th day of May, 1936. The defendant admitted the ownership of the insured property, its own corporate capacity, and that it was engaged in the business of writing and selling policies of insurance, by the terms of which it insured the policyholder against losses occasioned by fire, cyclone, tornado, windstorm and hail. The due issuance of the policy in suit was established. The defendant also admitted the occurrence of a windstorm and hailstorm on the 17th day of May, 1936, and admitted that "plaintiff has submitted to the defendant due notice of the loss herein sued on, alleged to have been occasioned to him." As a third paragraph of defendant's second amended answer, a provision of the policy in suit is set forth, and it is alleged that thereunder "any loss or damage occasioned to the property involved herein as a result of the storm occurring on May 17, 1936, was caused by high water, overflow, or cloudburst; or by water or rain which did not enter the building through openings in the roof or walls made by the direct action of the wind, and that, accordingly, said loss or damage was not covered or insured by the policy here in suit." Defendant's amended answer also contained a general denial of "all other allegations contained in said petition." The plaintiff joined issue by a reply, in form a general denial. In the district court a trial to a jury resulted in a verdict for plaintiff for the sum of $2,000, upon which judgment was entered. On defendant's appeal, this court, in an opinion written by Paine, J., (134 Neb. 563, 279 N. W. 170) set aside this verdict and judgment so entered, this

opinion closing with the words, "and the judgment of the trial court is hereby reversed." The following is an excerpt from the judgment of reversal entered by this court (Journal DDD, page 189) as its disposition of this cause:

"It is, therefore, considered, ordered and adjudged that said judgment of the district court be, and hereby is, reversed and cause is remanded for further proceedings according to law."

Thus, in neither the opinion, the judgment of reversal, nor the mandate conveying the orders of this court to the trial court, is there specific direction to the trial court to enter judgment in favor of the defendant upon the causes of action stated in plaintiff's petition as an entirety. On the contrary, there is in the opinion a specific declaration that, as to a part of the amount sued for, the plaintiff had sustained damages, the exact extent of which the evidence in the record of the case then before the court may be said to be obscure, indefinite, and uncertain. This court, in its opinion, made no finding that the physical facts, as established by the evidence in the case then made, were inconsistent with the existence of all elements of damages involved in the suit, but only as to a part thereof. In fact, it contained an express admission that the prevailing party in the court below had actually suffered damages within the protection of his policy, the amount of which the opinion of this court does not attempt to determine. Under this situation, the fact that the verdict, as an entirety, could not be sustained does not by necessary implication negative the right of plaintiff to a retrial of the case so far as the elements of damages actually suffered by him entitle him to relief.

The rule applicable in this jurisdiction appears to be that, upon reversal in this court of a judgment, if the facts in issue have not been fully developed, or definitely settled, though indicating that the party aggrieved has sustained actual damage, the appellate court, in reversing, will order a new trial. *Greer v. Doriot,* 137 Va. 589, 120 S. E. 291; *Hennessy v. Board of Chosen Freeholders of Burlington*

County, 91 N. J. Law, 693, 102 Atl. 672; *Meehan v. Kaplan*, 184 N. Y. Supp. 578; *Delaney v. Wyman*, 232 App. Div. 607, 251 N. Y. Supp. 5; *Wisconsin Nat. Loan & Bldg. Ass'n v. Webster*, 119 Wis. 476, 97 N. W. 171.

This is a general rule of appellate practice applicable not only in this jurisdiction, but one generally observed in all jurisdictions. It has been applied where the evidence before the appellate court is obscure, indefinite, uncertain, or otherwise unsatisfactory. *Farmers State Bank v. Weisenhaus*, 50 N. Dak. 949, 198 N. W. 673; *Kuykendall v. Merchants Nat. Bank*, 58 N. Dak. 396, 226 N. W. 533; *Wilkins v. Bank of Commerce*, 95 Fla. 85, 116 So. 13; *P. E. Anderson & Co. v. Barton*, 175 N. Y. Supp. 496; *Williamson v. Maynard*, 236 Ky. 33, 32 S. W. (2d) 538; *Leonard G. Kirk Co. v. Albert*, 113 N. Y. Supp. 1; *Branning Mfg. Co. v. Norfolk-Southern R. Co.*, 138 Va. 43, 121 S. E. 74; *King v. Tallmadge*, 45 N. Dak. 530, 178 N. W. 280.

As to the questions of disputed fact involved in this record (the amount of damages actually suffered) the plaintiff, after reversal and upon retrial, was entitled to his constitutional right of trial by jury, of which the record discloses no waiver. It therefore follows that when the trial court, on its own motion, entered judgment upon the mandate for an amount certain, and denied to appellant the right to prove his cause of action to, and have the same determined by, a constitutional jury, reversible error was committed. *Walters v. Village of Exeter*, 78 Neb. 222, 110 N. W. 631.

The plaintiff, under the rule above referred to, is entitled to a retrial of his cause of action generally, with the undoubted right to introduce further competent evidence to establish the actual extent of the damages sustained which are within the scope of the contract of insurance.

The judgment is, therefore, reversed and the cause remanded for further proceedings in harmony with this opinion.

REVERSED.

STATE, EX REL. RICHARD C. HUNTER, ATTORNEY GENERAL, APPELLEE, V. THE ARAHO ET AL., APPELLANTS.
289 N. W. 545

FILED JANUARY 5, 1940. No. 30541.

1. Nuisance. "A place kept for gambling purposes is a public nuisance." *Hill v. Pierson*, 45 Neb. 503, 63 N. W. 835.
2. ———. The amendment of section 24, art. III of the Constitution of Nebraska, to permit the pari-mutuel method of betting on the horse races when conducted by licensees within a race track inclosure at licensed horse race meetings, did not throw down the bars to permit gambling in Nebraska establishments upon horse races held in every state in the Union, as well as in foreign countries.
3. ———: INJUNCTION. The fact that the public nuisance against which equitable relief is sought constitutes a criminal act does not oust the jurisdiction of equity to enjoin the same.
4. ———. The remedy in equity is purely preventive. Equity does not punish the defendant for what he has done; that is left to the criminal courts.

APPEAL from the district court for Douglas county: JOHN A. RINE, JUDGE. *Affirmed as modified.*

O'Sullivan & Southard, McKenzie & Dugan and *William N. Jamieson*, for appellants.

Walter R. Johnson, Attorney General, and *Clarence S. Beck, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and CHAPPELL, District Judge.

PAINE, J.

This is an appeal from an injunction entered in a suit brought by the state of Nebraska on the relation of the attorney general against many defendants, restraining and enjoining them from conducting or operating illegal betting or gambling on horse races in their places of business in the city of Omaha.

The petition was filed February 24, 1938, and named as defendants Nebraska News Service, Inc., and then followed some ten pages of defendants, setting out the place of

business, its location, and certain individuals conducting each place of business. It was charged in said petition that each and all of the defendants were wilfully violating the statutory and constitutional provisions of the state of Nebraska prohibiting gambling, betting, or otherwise gaming for money or other valuable property, and were carrying on, maintaining, and operating unlawful horse race betting establishments and gambling rooms at some 76 designated places, all in Douglas county, Nebraska.

The petition further alleged that said gambling establishments were open to the public generally, and the public invited to enter and place bets on horse races being held daily throughout the United States and in other countries. In paragraph 5 of the petition there are 76 sections, describing in detail each one of said establishments, and the persons operating, maintaining, and conducting the same.

The prayer of the plaintiff is that the court shall issue a restraining order forthwith, upon which a hearing shall be had, at a time fixed by the court, for the purpose of making said restraining order effective as a temporary injunction, and that upon the final hearing said injunction be made perpetual, and for such other and further relief as might be deemed just and equitable.

Certain motions were filed by the defendants, which were overruled, and a temporary injunction was granted by the district judge. Thereafter demurrers were filed, and submitted without argument to the court, and were overruled, and ten days allowed to answer. The defendants deny each and every allegation, and charge that the temporary injunction was granted in violation of the First Amendment to the Constitution of the United States, and is also contrary to, and in violation of, section 1 of the Fourteenth Amendment to the Constitution of the United States, and to section 5, art. I of the Constitution of the United States, and to section 5, art. I of the Constitution of Nebraska, relating to freedom of speech, and further allege in said answer that ordinance No. 14469 of the city of Omaha was in full force and effect at all times mentioned

in the petition, providing for an occupation tax of $500 for the very type of business in which the appellants were engaged, which tax had been fully paid by the defendants.

In addition to said answer, the defendants filed a request for a jury trial, on the ground that the charge against each of the defendants is the commission of a crime, and that each of said defendants is entitled to have such accusation submitted to a jury for its determination. Various other answers were filed by some of the separate defendants, embodying practically the same allegations.

The cause came on for trial, whereupon the plaintiff and defendants joined in the offer of a written stipulation, exhibit No. 1, and asked that it be made part of the bill of exceptions. All of the evidence is, therefore, contained in such stipulation, of some 14 typewritten pages, duly signed by counsel for plaintiff and all defendants, and the county attorney of Douglas county. It first sets out that the Nebraska News Service, Inc., a Nebraska corporation, is a subsidiary of the Nationwide News Service, an Illinois corporation, which last-named corporation gathers news pertaining to the weather conditions, the condition of track, race track odds on various horses prior to each race, final result of races at all of the various race tracks throughout the United States, and transmits such information by telegraph to various subscribers; that the Nebraska News Service, Inc., receives such information in its office in the Woodmen of the World building in Omaha, and transmits the same through the facilities furnished by the Northwestern Bell Telephone Company to each of the establishments named as defendants herein, and collects a weekly charge from each of the stipulating defendants, and that such service is identical in each establishment, and is simultaneously received by each of them as per contracts therefor, and that the hearing of this cause as to said Nebraska News Service, Inc., is continued to a date to be hereafter agreed upon.

It was further stipulated that the action was instituted by the attorney general for and on behalf of the state of

Nebraska; that all other defendants except the Nebraska News Service, Inc., operated and maintained establishments, as designated in paragraph 5; that the public generally was invited to enter such establishments, by means of electric signs and other means, and to place bets of money with the defendants on horse races being held daily in various places outside the state of Nebraska and in the United States and in other countries; that race horse forms and scratch-sheets were provided, and blackboards, charts, and other paraphernalia were in such places of business, and that all information of every kind concerning the horses and races, and the results thereof, were given to the patrons.

It was further stipulated that the losses and winnings of the patrons of each establishment were wholly dependent upon the chance outcome of the horses participating in each race, and the selections made by the patrons, and the bets of money made pursuant to such selections.

Some of the defendants named herein, it was stipulated, maintained and operated the establishments described in connection with lunch stands, beer parlors, taverns, cocktail lounges, drugstores, grocery stores, and other types of business.

It was further agreed that a great many persons visited said establishments during the hours of each day when the horse races were conducted, many to place bets on the outcome of such races, and as a result large sums of money were wagered each day by patrons in said establishments, and that said establishments were generally patronized by both men and women; that in some bets were accepted as low as 25 cents, while others accepted no bets less than 50 cents; that in some of said establishments minors of high school age were allowed to enter and place bets and participate in betting upon horse races.

Paragraph 8 of said stipulation reads as follows: "That none of said establishments which are named as defendants in this action and who are participating in this stipulation were conducted in or located within any race track inclosure

at licensed race meetings here in the state of Nebraska."

It was further set out in said stipulation that on February 23, 1937, the city council of Omaha passed an ordinance, being No. 14469, levying an occupation tax of $500 a year for the business of maintaining and conducting the kind of establishments described in the petition, and that each of the places named in the petition herein had duly paid to the proper officer of the city of Omaha the said $500 occupation tax.

After certain defendants suffered their defaults to be taken, then trial was had upon the pleadings and the facts as set out in said stipulation, and decrees were duly entered by the court.

In the decrees it was ordered, adjudged, and decreed that each and all of the defendants, their agents, officers, servants, and employees, be perpetually enjoined from carrying on, or operating, or engaging, or participating in any way, in illegal betting or gambling on horse races by and through, or in connection with, their places of business, or in any other manner, and by any other means or method, and from suffering, or permitting, or allowing illegal betting or gambling on horse races in, or in connection with, their places of business in Douglas county, Nebraska.

The errors relied upon by the defendants for reversal of this case can be briefly stated as follows:

1. That the decree is not supported by sufficient evidence, and is contrary to the evidence.

2. That the decree is contrary to law, because the petition does not state a cause of action for equitable relief; because it does not charge the commission of acts within the cognizance of a court of equity, or which would confer jurisdiction on a court of equity to grant an injunction; because the constitutional amendment, and the legislative Act of 1935 legalizing pari-mutuel horse race betting within racing inclosures, declared a new public policy of the state of Nebraska, and in effect repealed all existing statutes with reference to horse race betting, and rendered such statutes ineffectual, and any decisions of the Nebraska

supreme court holding that such betting constituted a lottery are contrary to the now declared public policy of the state of Nebraska.

3. That the decree is contrary to law because the relief prayed for and the injunction granted is an attempt to vest in courts of equity criminal jurisdiction. The only inadequacy of the remedy at law alleged is that to prosecute for such crimes openly would involve a multiplicity of suits, and would be expensive and ineffectual. By this method of injunction, a court of equity violates the statutory right of every defendant to a trial by jury, guaranteed by section 6, art. I of the Constitution of Nebraska, to the effect that the right of trial by jury shall remain inviolate, and section 11, art. I of the Constitution of Nebraska, which guarantees that in all criminal prosecutions the accused shall have the right to public trial by an impartial jury.

4. That the decree is contrary to law because the courts have no authority to proceed by injunction to abate the alleged nuisance until the appellants severally have been tried and convicted of the crime of maintaining a public nuisance, as set out in section 28-1017, Comp. St. 1929.

5. That the decree is contrary to law because, under the home rule charter granted by the legislature to the city of Omaha, said city has a right to declare what are nuisances, and to regulate the same, and in the absence of an allegation that such city has neglected to exercise that function, and in view of the fact that the evidence affirmatively shows that the city, under this grant of power, had licensed the very business which the defendants were conducting, and which this action seeks to enjoin.

In reference to the first error alleged, this court is of the opinion that the stipulation of facts upon which the case was to be decided was sufficient to sustain a finding that defendants' places of business were public nuisances. This court has long been committed to the rule that gambling houses are public nuisances. "The evidence discloses that the rooms on the second or upper floor of the building occupied were used for gambling and open to the public

and resorted to for such purpose. One of the questions argued and presented for determination is, whether a house kept for gambling is a common or public nuisance. This must, in view of the authorities bearing upon it, be answered in the affirmative. See Roscoe, Criminal Evidence, 821; Garrett, Nuisances, 227; *Rex v. Rogier*, 1 B. & C. (Eng.) 272; Wood, Nuisances, 63; *Rex v. Dixon*, 10 Mod. (Eng.) 336; 8 Am. & Eng. Ency. of Law, 1073." *Hill v. Pierson*, 45 Neb. 503, 63 N. W. 835. See, also, 5 Pomeroy, Equity Jurisprudence (2d ed.) 4296, sec. 1893; 46 C. J. 707.

The second error relied upon for reversal by the defendants charges that the injunction was granted contrary to law, in that the people of this state, by amending the Constitution, had in effect repealed all former laws with reference to horse racing and betting thereon.

Section 24, art. III of the Constitution of the state of Nebraska, as set out in Comp. St. 1929, reads as follows: "The Legislature shall not authorize any games of chance, lottery, or gift enterprise under any pretense, or for any purpose whatever." Under this section of our Constitution, an original action was brought in this court to enjoin the Ak-Sar-Ben Exposition Company from conducting an unlawful betting scheme, and in the opinion announced in *State v. Ak-Sar-Ben Exposition Co.*, 118 Neb. 851, 226 N. W. 705, it was held that the pari-mutuel system of betting on race horses is a game of chance, a lottery, likewise gambling, and is unlawful under the Constitution of the state of Nebraska, and a temporary injunction was allowed, and such temporary injunction was made perpetual by this court in *State v. Ak-Sar-Ben Exposition Co.*, 121 Neb. 248, 236 N. W. 736. See, also, *Ak-Sar-Ben Exposition Co. v. Sorensen*, 119 Neb. 358, 229 N. W. 13.

At the general election held in November, 1934, an amendment to the above section of the Constitution was submitted to the voters of the state, and was carried, and thereafter section 24, art. III of our Constitution, as amended, has read as follows: "The Legislature shall not authorize any games of chance, lottery or gift enterprise; but nothing in this

section shall be construed to prohibit the enactment of laws providing for the licensing and regulation of wagering on the results of horse races by the pari-mutuel or certificate method, when conducted by licensees within the race track inclosure at licensed horse race meetings." Because of said amendment, the defendants in the case at bar insist that this amendment declared a new policy in our state with reference to betting on horse races, and had the effect of repealing any existing statutes with reference to horse race betting, and rendered former court decisions, holding that such betting constituted a game of chance and a lottery, of no effect as against the new declared policy of the state, as shown by the adoption of the amendment by the people of the state.

Acting on the authority given in said amendment, the legislature at its session of 1935 adopted laws governing the state racing commission and horse racing with pari-mutuel wagering, and the same is found set out in sections 2-1501 to 2-1519, as set out in Comp. St. Supp. 1935, and thereafter. The same legislature also amended sections 2-208, 28-942, 28-962, and 28-963, Comp. St. 1929, by adding thereto provisos that nothing therein should prohibit pari-mutuel wagering on horse races.

Section 2-1513, Comp. St. Supp. 1935, sets out that the purpose of the act was to encourage agriculture and horse breeding in the state of Nebraska, and that at each race meet there should, if possible, be at least one race on each racing day limited to horses foaled in Nebraska, and that 3 per cent. of the first money of every purse won by a horse bred in Nebraska should be paid to the breeder of such horse. This law clearly and specifically sets out the purpose of pari-mutuel racing in Nebraska, and nothing therein indicates that the bars are to be thrown down, as the defendants argue, to permit gambling in Nebraska upon horse races which may be held in every state in the Union and in foreign countries, as it must be evident that such widespread gambling upon horse races was not within the scope of the amendment, adopted by the majority of the

voters of Nebraska, to permit only pari-mutuel betting and gambling, or in the minds of the members of the legislature, who adopted section 2-1513, *supra,* but it only permitted a definite form, known as pari-mutuel horse race betting, and required that the same must be conducted under license duly issued by the state racing commission, and be conducted in strict accordance with the conditions and limitations as set out in said law, which requires that it be conducted by licensees within the race track inclosure at licensed horse race meetings.

In our opinion, nothing in the amendment to the Constitution of Nebraska, or in the laws passed to carry said change into effect, supports the contention of the defendants that the bars are now down on all forms of games of chance, betting, and gambling in connection with horse races of any kind, wherever held.

The third error relied upon by the defendants for reversal is that the injunction granted is an attempt to vest in courts of equity criminal jurisdiction, and that it also violates the right to a jury trial guaranteed by our Constitution.

The defendants in their brief cite 5 Pomeroy, Equity Jurisprudence (2d ed.) 4291, sec. 1890, wherein it is said: "A court of equity is in no sense a court of criminal jurisdiction. Its primary province is the protection of property rights. Hence, an injunction will not be granted to restrain an act merely criminal, where no property right is directly endangered thereby. Thus, an act morally wrong, such as gambling, will not be enjoined at the suit of an individual; nor will a violation of a Sunday law; nor a violation of a statute where no property rights are involved." However, in the same text, page 4296, section 1893, it is said: "As a public nuisance concerns the public generally, it is the duty of the government to take measures to abate or enjoin it. Hence, it follows that the government can obtain an injunction to restrain a public nuisance, without showing any property right in itself. The duty of protecting the property rights of all its citizens is sufficient to warrant issuing the

injunction. Therefore, wherever a public nuisance is shown, equity must enjoin it at the suit of the government. 'Every place where a public statute is openly, publicly, repeatedly, continuously, persistently and intentionally violated, is a public nuisance.' "

It has been held in many states that equity has jurisdiction in a suit by the state, and in the absence of statute, to abate a liquor nuisance, although the acts constituting the nuisance amount to a crime. A careful annotator cites the following cases: *Walker v. McNelly*, 121 Ga. 114, 48 S. E. 718; *Mugler v. State of Kansas*, 123 U. S. 623, 8 S. Ct. 273. Prize fighting may also be enjoined, although it constitutes a crime. *Columbian Athletic Club v. State*, 143 Ind. 98, 40 N. E. 914, 28 L. R. A. 727, 52 Am. St. Rep. 407; *State v. Fanning*, 97 Neb. 224, 149 N. W. 413.

In the case of *State v. Chicago, B. & Q. R. Co.*, 88 Neb. 669, 130 N. W. 295, this court held that a court of equity had jurisdiction to enjoin a railroad from serving intoxicating liquors on its dining cars, and in the text it seems to hold that the open, public, repeated, continuous, and persistent violation of law constituted a public nuisance which a court of equity could enjoin. See *State v. Omaha Motion Picture Exhibitors Ass'n*, 133 Neb. 89, 274 N. W. 397.

"If equitable grounds exist, as a general rule the fact that the nuisance against which equitable relief is sought constitutes a criminal act does not oust the jurisdiction of equity in the premises. The criminality of the act neither gives nor ousts the jurisdiction of the court of equity. The jurisdiction is exercised over the act as a nuisance as distinguished from the mere crime." 46 C. J. 762.

The equity court's jurisdiction to abate a nuisance is not affected by the fact that the creation or maintenance of the nuisance is a crime under the common law or by virtue of statutory enactment. 19 Am. Jur. 136, sec. 141.

In the case at bar, the defendants stressed at length that the granting of the injunction in this case deprived them of their constitutional right to a trial by jury, and to the right to be confronted by witnesses, and to be acquitted

unless proved guilty beyond a reasonable doubt, and deprived the defendants of the presumption of innocence, and also other safeguards provided in the trial of a person charged with the commission of a crime.

The facts as stipulated in the case at bar support the contentions that there is a wholesale, wilful, and continuous violation of the laws of the state of Nebraska, and that, even though the violation is but a misdemeanor, that fact will not oust the courts of equity of jurisdiction when the acts of the many defendants complained of clearly constitute a public nuisance under our law. *Hill v. Pierson*, 45 Neb. 503, 63 N. W. 835; *Kittle v. Fremont*, 1 Neb. 329.

The fourth error set out by the defendants is that courts have no authority to proceed by injunction until defendants have been tried and convicted of maintaining a public nuisance under section 28-1017, Comp. St. 1929.

The defendants call our attention to the fact that, before the amendment of the Constitution permitting pari-mutuel betting, such act was punishable as a crime, under sections 28-942 to 28-948, Comp. St. 1929, also under section 28-1017, *supra*. *State v. DeWolfe*, 67 Neb. 321, 93 N. W. 746.

"It is a general rule that, where acts complained of are in violation of the criminal law, courts of equity will not, on that ground alone, interfere by injunction to prevent their commission, as they will not exercise their power for the purpose of enforcing criminal laws, but there is a well-recognized exception to the general rule, namely, that where the acts complained of constitute a nuisance and endanger the public health and welfare, and where a more complete remedy is afforded by injunction than by criminal prosecution, a court of equity may, at the instance of properly constituted authorities, afford relief by injunction." *State v. Heldt*, 115 Neb. 435, 213 N. W. 578.

The remedy in equity is purely preventive. The chancellor does not punish the defendant for what he has done; this is left to the criminal courts. *Respass v. Commonwealth*, 131 Ky. 807, 115 S. W. 1131, 21 L. R. A. n. s. 836; *Pompano Horse Club v. State*, 93 Fla. 415, 111 So. 801, 52

A. L. R. 51; *State v. Fox Beatrice Theatre Corporation,* 133 Neb. 392, 275 N. W. 605.

The fifth error relied upon by the defendants for a reversal is that the decree is contrary to law because the city of Omaha, under its home rule charter, had passed an ordinance recognizing the specific business conducted by the defendants, and licensing the same for a fee of $500.

Section 5, art. XI of the Constitution of Nebraska, provides that any city having a population of more than 100,000 may adopt a home rule charter by a majority vote of its qualified electors. However, a municipal corporation has only such powers as are expressly conferred upon it, in matters of strictly municipal concern. But even in such cities state legislation is not excluded upon such subjects as pertain to state affairs. There being no strict test or guide for distinguishing municipal concerns from state affairs, the court passes upon each case as it arises. It held that education was a matter of state concern in *Carlberg v. Metcalfe,* 120 Neb. 481, 234 N. W. 87. See, also, 10 Neb. Law Bulletin, 474; *State v. Temple,* 99 Neb. 505, 156 N. W. 1063; *Eppley Hotels Co. v. City of Lincoln,* 133 Neb. 550, 276 N. W. 196; *State v. Halbert,* 115 Neb. 194, 212 N. W. 33; *Sandell v. City of Omaha,* 115 Neb. 861, 215 N. W. 135.

In section 4 of the Omaha ordinance No. 14469, it provides: "This ordinance is enacted solely as a revenue measure of the city of Omaha." So it is quite clear, by its own terms, that the purpose of the ordinance was not to regulate or control horse race gambling establishments, which the Constitution of our state expressly prohibits in section 24, art. III. It was, therefore, a question of state-wide interest.

The defendants in their brief also charge that the petition "prays for a personal injunction in perpetuity against individuals to enjoin each of them personally from committing a crime on the property described but not made a party defendant, *or elsewhere in Douglas county, Nebraska.*"

"The chancellor will not enjoin the mere commission of a crime; but, when property is used in such a way as to

become a nuisance, the continuance of this nuisance may be enjoined. There is a manifest distinction between enjoining an individual from committing a crime and enjoining the owner of property or its possessor from allowing his property to injure others. In the latter case the chancellor only regulates the use which may be made of the property, restraining the defendants from so using their property as to make it a nuisance to others. If the use of the property is such as to require that it should be restrained by injunction, the chancellor's jurisdiction is not affected by the fact that this use may be also a criminal offense. The remedy in equity is purely preventive. The chancellor does not punish the defendant for what he has done. This is left to the criminal courts. The only thing that he determines is that the defendants must not in future so use their property as to be a nuisance. The judgment does not convict them of any offense. It merely restrains them in future from so using their property as to make it a nuisance. The judgment deals merely with the use of the property in question. The chancellor may not enjoin the defendants from operating a poolroom anywhere; but he may enjoin them from so using the property referred to in the judgment as to make that property a public nuisance. The court of chancery will not restrain personal conduct, but it will restrain the unlawful use of property." *Respass v. Commonwealth,* 131 Ky. 807, 115 S. W. 1131.

We are rather inclined to the view that the decree as entered by the trial court was too broad. In our opinion, the decree should be modified to read as follows: It is therefore ordered, adjudged and decreed that the defendants, and all agents, officers, servants, and employees acting through and under them, be and they hereby are perpetually enjoined from in any way or manner carrying on or operating or maintaining such a public nuisance or public nuisances by engaging or participating in any way in illegal betting and gambling on horse races, or by suffering or permitting or allowing illegal betting or gambling on horse races to be carried on by, in, through, or in connection with

their place or places of business described in plaintiff's petition.

The decree as so modified is hereby affirmed.

AFFIRMED AS MODIFIED.

IN RE ADOPTION OF HARRIET CARLSON.
RAYMOND I. FOUTS ET AL., APPELLEES, V. HARRY CARLSON, APPELLANT.
289 N. W. 764

FILED JANUARY 5, 1940. No. 30665.

Adoption. When it appears that the conduct of a parent evidences a settled purpose to forego all parental duties and relinquish all parental claims to his child, a decree of adoption may be awarded without his consent under subdivision 6 of section 43-102, Comp. St. 1929, if other requirements of the statute are met.

APPEAL from the district court for Dakota county: MARK J. RYAN, JUDGE. *Affirmed.*

George W. Leamer and *A. W. Johnson*, for appellant.

Malcolm R. Smith, contra.

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

CARTER, J.

This is an appeal from a decree of adoption entered by the district court for Dakota county. Harry Carlson, the father of the child, appeals.

The record discloses that the child involved in these proceedings, Harriet Carlson, was born on May 14, 1926. In the spring of 1929 Carlson's wife left him, and in the divorce proceeding which followed, the custody of Harriet and two younger children was given to the father. At the time of the separation, however, Harriet was placed in the care of the petitioners, Raymond and Goldie Fouts. The two younger children were placed with another family and have never since been in the actual custody of the father.

It appears from the evidence that Goldie Fouts is an aunt of Harry Carlson, the father of Harriet. From the time that Harriet Carlson was placed in care of Raymond and Goldie Fouts until the filing of the petition for adoption on September 9, 1936, she has been cared for and treated as a daughter by them. The father, during this period, never contributed to the child's support, never communicated with the child, and after the first year or two never saw the child until he attended his grandmother's funeral on June 10, 1936. It is shown that the father, during the five years immediately before the trial of this suit in the district court, was amply able to contribute to the child's support had he cared to do so. It is not disputed in the record that the child had been properly clothed, fed and cared for by the petitioners. The child had also become greatly attached to the applicants and the applicants had likewise become much attached to the child. That the applicants are proper persons to have the care and control of a child of tender years is satisfactorily established by the evidence. The petition to adopt was filed on September 9, 1936. The mother of the child, Rene Carlson Nelson, filed a relinquishment and consent to the adoption of the child by the petitioners. The father, Harry Carlson, never consented to the adoption of the child and filed objections thereto. The question to be determined is whether the court, under the facts herein set out, may properly enter a decree of adoption without a relinquishment and consent to adoption by the father.

The portion of the statute applicable is as follows: "Any one of the following classes of persons may relinquish the custody and control of a minor child and consent to its adoption in the manner hereinafter prescribed, to wit: * * * Sixth. Any person, corporation or association that shall have had the lawful custody or control of any minor child for the period of six months last preceding, for the support of which neither parent shall without just cause or fault have contributed anything whatever during such period, may consent to its adoption." Comp. St. 1929, sec. 43-102.

The effect of the foregoing provision is to provide that complete abandonment of a child for a period of six months by the parents will warrant the adoption of such child by a person who has had the lawful custody or control of it for a like period of time without procuring a relinquishment and consent to adoption from the parents. Whether or not there has been an abandonment is a question of fact which must be determined by the evidence. It cannot be questioned that our adoption statute is primarily based on the consent of parents, if living and accessible, and an adoption without such consent must come clearly within the exception contained in the statute. *Tiffany v. Wright*, 79 Neb. 10, 112 N. W. 311. But we think the evidence in the instant case brings it within the exception hereinbefore quoted. For more than seven years the father made no effort to support, care for or look after the best interests of his child, athough he admits his ability to do so during the last five years of the period. He has permitted the full responsibility for the maintenance and care of this child to fall upon these petitioners. He has permitted a relationship to grow between the child and petitioners that any court would hesitate to disturb. The father has become a stranger to his daughter because of his failure to carry out the legal and moral duties which he owed to her. He has remarried and has a child by the second wife. He has made no provision for his other children and they have not been brought back to his home. We are convinced that the trial court was justified in finding that the conduct and actions of the father are sufficient to establish an abandonment of the child on his part. The evidence shows conduct on the part of the father which evidences a settled purpose to forego all parental duties and relinquish all parental claims to his child. This, in our opinion, imports an abandonment of the child and brings the case within the section of the statute quoted. *Winans v. Luppie*, 47 N. J. Eq. 302, 20 Atl. 969.

We conclude that the decree of adoption was properly entered.

AFFIRMED.

MARJORIE HOLBERG, APPELLANT, V. CHARLES W. MCDONALD, APPELLEE.
289 N. W. 542

FILED JANUARY 5, 1940 No. 30674.

1. **Automobiles.** In a civil action arising out of a motor vehicle accident, the character or reputation of either party as a motor vehicle driver is irrelevant and is not admissible in evidence to prove or disprove negligence.
2. **Appeal.** A case will not be reversed for errors against a party not entitled to succeed in any event.
3. **Record** examined. *Held* insufficient to support a finding of gross negligence on the part of the driver of defendant's car.

APPEAL from the district court for Scotts Bluff county: GEORGE W. IRWIN, JUDGE. *Affirmed.*

Morrow & Miller, for appellant.

Neighbors & Danielson, contra.

Heard before SIMMONS, C. J., EBERLY, PAINE, MESSMORE and JOHNSEN, JJ., and KROGER and ELLIS, District Judges.

ELLIS, District Judge.

In this case the plaintiff, a minor, sues to recover for personal injuries sustained while riding in the automobile of defendant as a guest of his son.

The cause is necessarily controlled by the guest statute, section 39-1129, Comp. St. Supp. 1937.

At the close of plaintiff's evidence defendant moved for a directed verdict on the ground that the evidence failed to show gross negligence on the part of the driver of defendant's car. This motion was overruled and at the close of all the evidence the cause was submitted to the jury who returned a verdict for the defendant. From the overruling of plaintiff's motion for new trial and dismissal of plaintiff's cause of action this appeal was taken.

Errors assigned will be stated in connection with discussion following.

The plaintiff complains of the trial court's ruling permitting answer to the following question put to the defend-

ant while a witness in his own behalf: "Q. From your experience as a driver and observing Donald drive do you know whether or not he is a prudent and careful driver? Mr. Morrow: Objected to as incompetent, irrelevant and immaterial. The question is what he did on this occasion. The Court: Overruled. A. He was a careful driver."

We think the overruling of the objection and admission of the answer was clearly erroneous. "In a civil action the character or reputation of a party is deemed by the law to be irrelevant in determining the merits of the controversy." Jones, Evidence (4th ed.) 257, sec. 148. The reputation of a driver and his conduct at other times and places are not reliable or safe criterions by which to determine what his conduct was at a particular time and place.

Most automobile drivers operate their vehicles over many thousands of miles without accident and in the presence of the ever-present hazard of other traffic, and yet we are appalled by too many thousands of serious accidents. This situation justifies the conclusion that most motor vehicle accidents chargeable to man-failure are due to lapses from the customary skill and care of the drivers involved. A very poor or careless driver may have been wholly free from fault in the particular instance involved and, likewise, the most skilful driver, accustomed to exercising the utmost care, may be grossly negligent on one particular occasion. In either situation, to hold that the rights and liabilities of the parties should be determined, not solely by what they did, but by their conduct on other occasions and in different situations would put us on a tortuous trail—tedious, difficult and expensive to follow, and leading in the end only to intolerable injustice.

The appellee cites no cases from this jurisdiction directly supporting his contention that the evidence was properly admitted. We have examined the cases cited from this jurisdiction, which appellee contends support the trial court's ruling, and conclude that they are not analogous in principle and do not conflict with our conclusion herein. The appellee cites cases from other jurisdictions which appear to directly

support his position. As to these, we can only say that we do not agree with the conclusions therein reached and are unwilling to adopt the rules therein announced as rules applicable to this state.

We conclude that the ruling complained of was erroneous and that ordinarily the ruling would require reversal. However, this conclusion does not necessarily require reversal. Comp. St. 1929, sec. 20-853. By reason of the statute which imposes a salutary rule upon the court, we are not required to reverse a cause if the ultimate result reached is the only one that could be reached on the record and uninfluenced by errors that may be found. This court has frequently held that, where the conclusion reached by the jury was the only one permissible under the pleadings and evidence, the judgment will be affirmed. See *Patrick v. Shallcross*, 123 Neb. 742, 243 N. W. 907, and cases cited therein. The error above discussed occurred while defendant was putting in his evidence and therefore did not prejudice the plaintiff in the presentation of her evidence.

The other errors complained of relate to the given or refused instructions. We will therefore proceed to a consideration of plaintiff's case with a view to determining whether it is sufficient to entitle plaintiff to go to the jury or recover in any event, bearing in mind that plaintiff was under the burden imposed by the guest statute of showing such negligence on the part of defendant's son as would justify a jury in finding that it constituted gross negligence.

The accident in question occurred November 28, 1937, at about 10:15 o'clock in the evening about 1½ miles west of Morrill on a straight, level, oiled highway. The night was clear, but no moon was shining. The defendant's car collided with the rear end of a truck with a dark green beet-box on it. The truck had stopped because of light failure with at least the left wheels on the pavement. The cab of the truck was a green or gray color. The driver of the truck had not had time after stopping to put out his flares and the evidence affirmatively shows that the truck had no

lights burning. The rear of the box had a red glass reflector on the left side, but it was 4 or 5 feet or more above the pavement. The right-hand windshield and door post of defendant's car struck the left rear corner of the beet-box and the truck was moved forward by the impact 20 or 25 feet. After the impact the defendant's car moved to the left past the truck and then to the right, ending up in the borrow pit on the right side of the road some distance ahead of the truck. The box on the truck was about 4 or 4½ feet above the pavement. There was no damage to the radiator of defendant's car, indicating that the car was either turned so that the radiator did not come in contact with the box or else the radiator passed under the box.

The defendant's son and a young lady were riding in the front seat and plaintiff and another young man were riding in the back seat. The plaintiff testified that they stopped at a stop sign on the west edge of Morrill, that the driver shifted gears and then put his arm around the young lady riding in the seat with him. This was the last thing plaintiff remembered. Likewise, the other young lady remembered nothing after the driver shifted gears following the stop for the stop sign and the driver put his arm around her. When asked if she told him to take his arm from around her, she answered that she did not because she did not have time. If this incident occurred immediately following the shifting of gears following the stop for the stop sign on the west side of Morrill, it must have been a mile or more from the point of the collision. Perhaps there was time for such a request. This young lady did not see the truck, but she did not remember whether she was looking down the road or not.

On the evidence, considered in the light of the many decisions of this court involving the guest statute, we think the trial court should have sustained defendant's motion for directed verdict on the ground that as a matter of law it was insufficient to show gross negligence on the part of defendant's son, as required by the statute. The most that can be claimed for plaintiff's evidence is that the driver was

negligent in not seeing the truck in time to avoid a collision with it. Considering the color of the truck cab and box, the height of the box from the pavement, the entire absence of lights and the movement of the car at and immediately following the impact, we conclude that the negligence of the driver did not reach the degree required by the statute.

The law of this state provides that head-lamps of a motor vehicle shall be deemed to comply with legal requirements "if none of the main bright portion of the head-lamp beam rises above a horizontal plane passing through the lamp centers parallel to the level road upon which the loaded vehicle stands and in no case higher than *forty-two inches,* seventy-five feet ahead of the vehicle." Comp. St. Supp. 1937, sec. 39-1176. (Italics ours.) The law does not contemplate that unlighted vehicles shall be standing on highways at night, and if the driver's lights were on the high beam as he approached the truck with the bulk of its body above the high beam, we do not think his failure to see it rises above ordinary negligence upon such a finding by a jury.

The car in which the plaintiff was riding was traveling west and plaintiff's evidence discloses that a car going east passed the truck just as the truck driver was "going to stop." This car must have met the defendant's car and very shortly before the collision. In the absence of evidence to the contrary, there arises a presumptive inference that defendant's driver complied with the law by dimming his lights on meeting the other car. If, following this operation, he had not restored his lights to the high beam, there would be yet more reason for our conclusion.

So far we have refrained from considering any of the evidence offered by the defendant. With reference to it, it will suffice to say that disinterested drivers who approached the truck from the west at and immediately following the collision stated their own failure to see the truck until right upon it, confirmed the extremely low visibility of the truck and dimming of the lights on defendant's car. One witness thought the driver of defendant's car dimmed his

lights before the driver of the car in which the witness was riding and this 200 yards away. The collision followed almost immediately.

In *Monasmith v. Cosden Oil Co.*, 124 Neb. 327, 246 N. W. 623, this court said: "Where an object on a highway in front of one driving thereon at night is so nearly the color of the road that it may be difficult to distinguish it until quite close, it cannot be said, as a matter of law, that such person was guilty of more than slight negligence in his failure to see it in time to stop his car or to prevent running against it." See, also, *Giles v. Welsh*, 122 Neb. 164, 239 N. W. 813.

The appellant cites the case of *Hendren v. Hill*, 131 Neb. 163, 267 N. W. 340, as supporting her contention that defendant's son was guilty of gross negligence as a matter of law. We think the following facts from that case clearly distinguish it from plaintiff's case: In that case the night was clear and the moon was shining. The defendant's car had good lights and was traveling at high speed—40 to 50 miles an hour. The defendant's car struck the parked car squarely and carried it 100 feet. The defendant was not meeting any other car. *There was a sharp conflict in the evidence as to whether there were lights on the parked car.* The occupants of other cars passing the parked car before the accident saw it and saw it distinctly enough to recognize a household mattress tied on the back of it.

Concluding, as we do, that there was no error prejudicing the plaintiff in the presentation of her evidence and that the verdict of the jury was the only one that could be sustained on that evidence, the judgment of the trial court is

AFFIRMED.

LU ETTA MAY GUGELMAN, APPELLEE, V. KANSAS CITY LIFE INSURANCE COMPANY, APPELLANT.

289 N. W. 842

FILED JANUARY 19, 1940. No. 30664.

1. **Appeal.** "In order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited." *Cox v. Kee*, 107 Neb. 587, 186 N. W. 974.
2. ———. "Alleged error in the exclusion of offered testimony is of no avail if the same testimony, or testimony to the same effect, had been, or was afterwards, allowed to be given by the witness." *Union P. R. Co. v. Evans*, 52 Neb. 50, 71 N. W. 1062; *Lautenschlager v. Lautenschlager*, 134 Neb. 577, 279 N. W. 200.
3. Insurance. The record is examined, and *held* that it does not establish, as a matter of law, that the insured was not in good health at the time of the issuance and delivery of the policy in suit.

APPEAL from the district court for Frontier county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Cheney & Cheney, for appellant.

Butler, James & McCarl and *Frank B. Morrison, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

SIMMONS, C. J.

This is an action to recover the death benefits provided for in a policy of life insurance. Plaintiff prevailed in the court below. Defendant appeals.

Plaintiff alleges the application for and the issuance of a policy of life insurance to one Lawrence I. Gugelman, hereinafter called the insured, payment of the first and second annual premiums, the death of the insured while the policy was in force, proof of death, the full performance of all conditions and provisions of the policy, and defendant's refusal to pay. In its answer, the defendant admits the issuance of the policy, the payment of the premiums, the death of the insured during the period for which the premiums were paid, and alleges that less than five months prior to his application for insurance the insured was treated for

heart trouble and was advised of his physical condition; that, in answer to three questions in the application, the insured falsely and fraudulently omitted information relative to his condition and treatment therefor; that the answers were material to the risk assumed; that they were taken to be true and were relied upon; that the defendant first learned of the falsity of the answers subsequent to the death of the insured; that defendant would not have issued the policy had the questions been truthfully answered; that the insured was not in good health when the policy was delivered, and that, by reason thereof, defendant is not liable. Defendant tendered the return of the premiums paid.

The plaintiff replied, and alleged that the defendant's agent propounded the questions to the insured; that true answers were made; that, if any part of the application was false (which plaintiff denied), it was so written by the defendant's agent with full knowledge of the facts; and that defendant is estopped to claim that any answer contained in the application is false.

Trial was had to a jury. After both parties had rested, the defendant moved for a directed verdict. The motion was denied. The motion will be set out later herein. The jury's verdict was for the plaintiff.

Defendant assigns two errors upon which it relies for reversal.

The doctor's deposition was taken and offered by the defendant. The first assignment is the refusal of the trial court to permit the reading in evidence of the doctor's answer to the following question: "And was he," (the insured) "at that time, advised that he was being treated for a condition of the heart?" The record does not disclose that the defendant made an offer as to what the doctor's answer would be if his answer were admitted.

This court has held: "In order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited." *Cox v. Kee*, 107 Neb. 587, 186 N. W. 974.

The record reveals that this question was subsequently asked: "Do you recall that you did advise him as to the condition of his heart at that time?" The answer was admitted, as follows: "I think I did tell him what his trouble was * * *."

This court has held: "Alleged error in the exclusion of offered testimony is of no avail if the same testimony, or testimony to the same effect, had been, or was afterwards, allowed to be given by the witness." *Union P. R. Co. v. Evans*, 52 Neb. 50, 71 N. W. 1062; *Lautenschlager v. Lautenschlager*, 134 Neb. 577, 279 N. W. 200. The defendant's first assignment of error is not sustained.

Defendant's second assignment is that the trial court erred in overruling its motion for a directed verdict. This contention is based upon the proposition that "a provision that a policy shall not take effect unless the insured is in good health upon the date of issuance, is a condition precedent without which there is no liability under the policy."

At the time the application for insurance was signed, the insured paid the agent $11.75 in cash, and gave him a note for $11.75. The clause in the application, which defendant now argues is a condition precedent to liability, is as follows: "If this application is not accompanied by the first premium in cash it is agreed that the company assumes no liability whatever until a policy of insurance is actually delivered to me during my lifetime and while I am in good health * * *."

The defendant's motion for a directed verdict was as follows:

"The defendant moves for a directed verdict on the ground that the undisputed evidence shows that Lawrence I. Gugelman was treated for heart trouble five weeks before signing his application for insurance with the defendant company; that he interviewed Doctor Brewster twelve days before signing his application; that he knew the cause for his treatment. That at the time of signing of the application he stated that he was in good health; that the statement was false. That he accepted the policy with that ques-

tion in the application, a photostatic copy of which was attached to the policy; and that he accepted the policy with that question and answer in the same and made no objection; and that he died of heart failure."

It appears to the writer that the above motion went to, and directed the court's attention to, the truth or falsity of the answers to the questions contained in the application, and did not direct the court's attention to, and was not based upon, the clause in the application above set out. However, it will be treated as having raised the question now presented.

We have carefully examined the testimony offered dealing with this proposition. The application for the insurance was dated May 4, 1937. The policy was dated May 12, 1937. The evidence is not specific as to the date of the delivery. The most definite statement is that it was delivered about two weeks after the application, which would be about May 18. What, then, is the evidence as to the condition of insured's health *at that time?*

The insured was examined by Dr. F. A. Brewster, of Holdrege, Nebraska, on January 27, 1937. The doctor's record shows that at that time the insured complained of "pain in region of heart and shoulder and arm, short of breath on exertion." His blood pressure was 130/70. His urine was normal. The record further recites that the physical examination showed "heart enlarged" and that he "advised rest."

The doctor stated that he then advised against heavy work and as to his diet. At that time he prescribed a tonic.

The insured went to the doctor "for treatment" on February 24, 1937, March 26, 1937, and April 22, 1937. The findings in the February examination are not disclosed. The March examination indicated a high blood pressure and a heavy duty on the heart as a result thereof. The doctor's record did not indicate a "worse condition" at that time. The April examination showed the blood pressure to be less than it had been at the time it was recorded in either January or March. The doctor recalled no advice given the insured at that time about his condition.

At various times the doctor told the insured not to work so hard. Defendant's other evidence as to the condition of the health of the insured is the statement of the mother (plaintiff) on the "proof of death" that the cause of the death was "heart failure." In answer to the question, "When did last illness begin?" the answer was "Two hours before death." Death occurred May 15, 1938, or a year and three days following the date of the issuance of the policy. The doctor who attended the insured at the time of his death did not testify.

The plaintiff's evidence in rebuttal shows that the insured worked about his farm at all times from January, 1937, to the time of his death; that he was not incapacitated, never complained, that his appetite was good, and that he slept "good." When the application was made by the insured, he made no complaint about being in bad health; he appeared to be in good health and to have a strong constitution.

This court has held:

"The delivery of a life policy, the acceptance of premiums, and the treatment of the policy by the insurer and the insured as a contract raises a presumption that insured was in sound health on the date of the policy.

"The burden of proving *as a defense* that insured at the date of the policy was not in sound health is upon insurer." *Weddle v. Prudential Ins. Co.*, 130 Neb. 744, 266 N. W. 624.

Good health is a generic expression, resting mostly in opinion. *Hinnenkamp v. Metropolitan Life Ins. Co.*, 134 Neb. 846, 858, 279 N. W. 784. Good health "is a comparative term, and means that the insured has no important or serious disease; in other words, that he is free from any ailment that seriously affects the general soundness or healthfulness of the system, as distinguished from mere temporary indisposition, which does not tend to weaken or undermine the constitution, though existing at the time." 1 Couch, Cyclopedia of Insurance Law, 244, sec. 130. See, also, 37 C. J. 402.

The fact that insured had an enlarged heart in January, 1937, and high blood pressure in March, 1937, and died of

"heart failure" in May, 1938, does not show, as a matter of law, that the insured was not in good health at the time of the delivery of the policy in May, 1937. This is particularly true in view of the fact that the evidence indicates that he was "working right along" at the time the policy was taken out; that, from April, 1937, until the time of his death, it does not appear that he had consulted a doctor or was in need of medical treatment; and that defendant did not establish, as a matter of direct evidence, that, if the agent had correctly stated in the application the facts regarding the insured's visits to and the findings of Dr. Brewster, it would have refused to issue the policy.

The defendant's second assignment of error is not sustained.

The judgment of the trial court is

AFFIRMED.

MINNIE H. KELKENNEY, APPELLANT, V. KATHERINE GETSEY, SPECIAL ADMINISTRATRIX, APPELLEE.

289 N. W. 795

FILED JANUARY 19, 1940. NO. 30732.

1. **Executors and Administrators.** The functions of a special administrator appointed by the probate court are to possess, control and preserve the estate of decedent until the granting of letters testamentary or of administration.
2. **Divorce.** In a supplemental proceeding in a divorce suit to reform the decree of divorce to allow alimony, the district court is without jurisdiction to substitute as a party a special administratrix for a deceased husband who had procured a divorce from his wife on the ground of desertion, where no claim for alimony was pleaded, tried or adjudicated in the original action.

APPEAL from the district court for Douglas county: WILLIAM A. DAY, JUDGE. *Affirmed.*

Hotz & Hotz and *William F. Dalton*, for appellant.

Max Fromkin, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

ROSE, J.

This is a proceeding by Minnie H. Kelkenney, defendant, against Katherine Getsey, special administratrix of the estate of James B. Kelkenney, deceased, plaintiff, to so reform a decree of divorce as to allow alimony for defendant, the divorced wife of decedent. This relief is sought in the original action in which the husband, as plaintiff, was granted a divorce from his wife, as defendant, on the ground of desertion without any reference to alimony in the pleadings or decree.

The parties to the action for divorce were married January 6, 1911, and lived together as husband and wife for about 10 years. The petition for divorce was filed in the district court for Douglas county October 1, 1921. The divorce was granted by default November 5, 1921, after personal service of summons on the wife, but prior thereto the husband had entered into an oral agreement with her to pay her for life alimony of $1,000 a year in monthly instalments of $83.33 each and to have the agreement incorporated in the decree. He performed the oral contract for about 10 years but failed to have his obligation to pay alimony inserted in the decree of divorce. After 1930 he was in default and excused nonpayment on account of the economic depression. He died May 3, 1938, and she thereafter discovered for the first time that the agreement for alimony had not been inserted in the decree for divorce.

The facts thus briefly outlined were stated at length in the petition to reform the decree. Thereupon, Minnie H. Kelkenney, defendant in the original suit for divorce, presented therein a motion to substitute for plaintiff Katherine Getsey, special administratrix of the estate of James B. Kelkenney, deceased, and to so revive the action.

The special administratrix objected to the jurisdiction of the court for the reasons that the action is one for divorce wherein a final decree was entered November 5, 1921,

without any judgment other than for a divorce, and that the statutes of Nebraska do not authorize the substitution of the special administratrix for the deceased plaintiff or a revivor of the action. The trial court sustained the special appearance and defendant appealed.

The functions of a special administratrix appointed by the probate court are to possess, control and preserve the estate of decedent until the granting of letters testamentary or of administration. The powers and duties of a special administrator are defined by statutes containing, among provisions not applicable to the present inquiry, the following pertinent legislative enactments:

"When there shall be a delay in granting letters testamentary, or of administration, occasioned by an appeal from the allowance or disallowance of the will, or from any other cause, the judge of probate may appoint an administrator to act in collecting and taking charge of the estate of the deceased, until the question of the allowance of the will, or such other question as shall occasion the delay, shall be determined, and an executor or administrator be thereupon appointed." Comp. St. 1929, sec. 30-316.

"An administrator, appointed according to the provisions of the preceding section, shall collect all the goods, chattels, and debts of the deceased, and preserve the same for the executor or administrator who may afterwards be appointed, and for that purpose may commence and maintain suits as an administrator, and may sell such perishable and other personal estate as the county court may order to be sold." Comp. St. 1929, sec. 30-317.

"Such special administrator shall not be liable to an action by any creditor, to be called upon in any other way to pay the debts against the deceased." Comp. St. 1929, sec. 30-318.

According to plain provisions of the statutes quoted, the special administratrix is not authorized to appear in the divorce suit in defense of the claim of defendant against the estate of the deceased plaintiff for alimony. The administratrix as such is not liable in the divorce action for the

alleged debt of decedent. She was therefore not a proper party defendant for the purpose of determining the liability of the estate for alimony under an oral unadjudicated agreement by the husband to pay it. It follows that the district court was without jurisdiction to substitute the special administratrix for decedent as plaintiff in the divorce suit and that the action could not be revived in her name in that capacity. In this view of the law the district court did not err in sustaining the objection to jurisdiction and in overruling the motions to substitute the special administratrix for decedent as plaintiff and to revive the action in her name as such.

The same conclusion necessarily would have to be reached if defendant had awaited the granting of letters testamentary or of administration and pursued the executor or administrator for alimony on the oral promise of her divorced husband to pay it. The record contains a copy of the petition in the divorce suit. The husband was plaintiff. He alleged that his wife had deserted him and he procured the divorce on that ground. He did not plead an oral promise to pay alimony or his ability and willingness to pay it or cause such an obligation to be inserted in the decree. Alimony was not mentioned in the petition. No issue as to such a claim was tried or adjudicated. The wife was duly summoned to appear in the divorce court and plead but failed to do so. Alimony was not mentioned in the decree granting the divorce to the husband. There was therefore no allowance for alimony that could be reformed in this supplemental proceeding. Every issue in the divorce case had been adjudicated more than 17 years before the application for a supplemental decree was made. Since the claim of defendant for breach of an oral promise to pay alimony cannot now be adjudicated in the divorce case, the judgment of the district court is

AFFIRMED.

DORENE LARSON, APPELLEE, V. LEROY STORM, APPELLANT.
289 N. W. 792

FILED JANUARY 19, 1940. No. 30719.

1. **Automobiles.** Gross negligence has been defined as an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others.
2. ———. The continued failure of the driver of an automobile to maintain a proper lookout along the road ahead of him, when driving at high speed in the nighttime on a country road, is a fact which the jury should consider in determining whether gross negligence had been proved.

APPEAL from the district court for Saunders county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

Clyde R. Worrall, Cook & Cook and *Wear, Boland & Nye,* for appellant.

Schiefelbein & Donato and *McKenzie & Dugan, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

PAINE, J.

This is an action for personal injuries in an automobile accident, the plaintiff being the guest of the defendant. The first trial resulted in a mistrial. The jury returned a verdict for the plaintiff for $3,500 on the second trial, and the defendant appealed from the judgment entered upon the verdict.

The plaintiff and defendant resided on farms not far from each other. The plaintiff was a rural school-teacher, 20 years of age, and the defendant a young farmer, 23 years of age, and they had been keeping company for something over a year, attending various social functions together. They went to a dance at Memphis, in Saunders county, in his 1930 Model A Ford coupé on Saturday night, and the accident occurred early Sunday morning, January 9, 1938, in returning from the dance. Memphis is about ten miles

from plaintiff's home. The accident occurred about six miles therefrom.

At the time of the accident, as they were traveling east on an ordinary country road, they went down a slope some 220 yards to a wooden bridge 71 feet long, and at the end of this bridge the road immediately curves slightly towards the north, and beyond that a large concrete pipe goes under the road for drainage purposes as a culvert, and the ends of it projected out on each side of the road. The bridge was old, had two railings on each side, and had been repaired by putting in at least one new plank, which projected a short distance above the planks on either side of it, where the wheels had worn down the older planks.

The defendant's testimony was to the effect that he was going 35 to 40 miles an hour, and struck this new plank, and that this caused a blow-out in the right front tire, and the two right wheels ran off the road and ran along in the ditch. He attempted to bring the car back up into the road, but failed, and in jerking the car the plaintiff was thrown out of the car when defendant struck the end of this cement pipe. Both the plaintiff and defendant testified they heard no noise of a blow-out.

The plaintiff testifies that, as they were leaving the dance, defendant suddenly became angry at a man and whirled around to face him, knocking the plaintiff down with his elbow, but, before the men got to fighting, Kris Kalb, the uncle of defendant, stopped the quarrel. In returning from the dance they followed Mr. Kalb's car, which was going about 35 to 40 miles an hour, but after several miles, when they reached the top of the hill, the defendant increased his speed, and ran around his uncle and went down the hill. The plaintiff complained, and said she told him he was driving too fast, and should slow down; that she said this in a loud voice, because she was frightened. She testified that the defendant turned his head, and kept looking at her as he crossed the bridge at 50 to 55 miles an hour; that he failed to make the slight turn at the end of the bridge, and lost control of the car, and the wheels on the right side

went down about two feet toward the ditch; that his speed was not slackened, and when the right front wheel hit the end of the projecting cement pipe the car bounced up, the door flew open, and she was thrown out onto the frozen ground and injured. She testified that defendant picked her up, laid her on the seat of his car with her feet hanging out, while he went to get his uncle, Kris Kalb, who came, and they lifted her into his car, and she was taken home. She said she screamed with pain as they took her in the house, where she remained until January 21, when she was taken to the Bryan Memorial Hospital in Lincoln, where X-rays disclosed a badly fractured pelvis and sacrum, the bones being splintered and having slipped over each other. Her hips were placed in a canvas belt with weighted pulleys attached, in which she remained eight weeks, according to the testimony of Dr. Charles Arnold. In three and a half months she was able to walk, and to resume her teaching position.

Kris Kalb testified that he was an uncle of the defendant, and lived about six miles from the plaintiff. He testified that the new plank in the bridge did not project over a quarter of an inch above the old planks; that early the next morning he went down to where defendant's car was, and that there had been no blow-out, as the front tires were not down when he got there. He said the hood was thrown about eight or ten feet from the car.

An expert tire man brought a spreader before the court, and showed the jury that there was a defect on the inside of the tire, but it was not a blow-out in the usual and accepted use of that word. The expert admitted that, if it had been a blow-out and then ran 280 feet on hard, frozen ground, the tube would show many cuts, whereas the tube showed no cuts.

Plaintiff testified that the defendant said to her after the accident, "If anything happens to you it's all my fault because I thought I was smart passing my uncle." The defendant denies this.

The defendant testified that there was a blow-out on the

right front tire when it hit the new plank in the bridge, which was two inches higher than the old planks. He was not supported by the other evidence on these points. He testified it was about 66 feet from the bridge to where the car stopped against an old tree stump. Other evidence indicated it was 280 feet.

As to the use of intoxicating liquor, plaintiff testified that when they arrived at the dance they both had a pint bottle of beer, and that she had no more, but did not know whether he got more when he went downstairs several times with the other men. The defendant testified that he had one more bottle of beer. The mother of the plaintiff testified that she detected very strong liquor on his breath when he brought the daughter home, that he acted "dumpy," and would not talk. The father of the plaintiff at once accused him of drinking, and defendant admitted he had some beer. In leaving the dance, as detailed above, the defendant had an altercation with another man, which nearly resulted in a fight.

In spite of all this evidence in reference to the defendant drinking, the court gave instruction No. 18, as follows: "The jury is instructed that there is no competent evidence offered by the plaintiff to sustain the allegation in her amended petition that the defendant was intoxicated or under the influence of intoxicating liquor at the time of said accident. That issue has been withdrawn by the court." This instruction was instruction No. 2 offered by the defendant, and given in a slightly modified form by the court.

Defendant, for reversal, assigns the alleged error of the trial court in overruling defendant's motion for a directed verdict in his favor at the close of plaintiff's evidence, and again at the close of all the evidence. He also assigns as error the refusal to give instruction No. 1, requesting an instructed verdict. Further error is charged in overruling defendant's motion for a new trial.

This action is governed by the Nebraska guest statute, being section 39-1129, Comp. St. Supp. 1939, the first sentence of which reads as follows: "The owner or operator

of a motor vehicle shall not be liable for any damages to any passenger or person riding in said motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver of said motor vehicle being under the influence of intoxicating liquor or because of the gross negligence of the owner or operator in the operation of such motor vehicle."

The defendant cites all of the recent decisions of this court in which plaintiff has failed to recover in personal injury cases resulting from automobile accidents, and from them argues that there can be no recovery here. We will examine several in which judgments have been recovered.

In *Black v. Neill,* 134 Neb. 764, 279 N. W. 471, the defendant turned his head to the left and pointed out a tree which had blown down upon a porch, forgetting about the stop sign on Grace street. To make the stop, he applied the brakes so suddenly that the plaintiff was thrown into the windshield of his car and injured. It was stated in the opinion that turning the head, taking the eyes off the road, under some conditions and circumstances might constitute gross negligence.

In *Morris v. Erskine,* 124 Neb. 754, 248 N. W. 96, it was held: "Gross negligence * * * means negligence in a very high degree, or the absence of even slight care in the performance of a duty." See, also, *Heesacker v. Bosted,* 131 Neb. 42, 267 N. W. 177.

In our opinion, the case of *Sterns v. Hellerich,* 130 Neb. 251, 264 N. W. 677, is closely in point. Four young folks were late, and in hurrying to get to a weiner roast went over the top of a hill at 50 to 55 miles an hour, and did not slacken speed, and crashed through the side of a bridge. The driver was warned that there was a bad place at the bridge. We said in that opinion: "Adolph was driving the car at night on a curving road down a steep hill and approaching a narrow bridge, of which he was aware, at a speed of 50 miles an hour, when he had been warned that there was a dangerous place in the road ahead. He chose to disregard the warning and continued the reckless driving,

with the disastrous results indicated. We think that, under the circumstances, the question of gross negligence was one for determination by the jury."

Other Nebraska cases which we believe will support a verdict in the case at bar are: *Howard v. Gerjevic,* 128 Neb. 795, 260 N. W. 273; *Kovar v. Beckius,* 133 Neb. 487, 275 N. W. 670; *Gilbert v. Bryant,* 125 Neb. 731, 251 N. W. 823; and the cases involving the Iowa guest statute, *Bailey v. Bryant,* 127 Neb. 843, 257 N. W. 241, and *Jennings v. Biurvall,* 122 Neb. 551, 240 N. W. 757.

"Gross negligence, within the meaning of these statutes, has been variously defined—as 'the want of slight diligence,' as 'an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others,' and as 'that want of care which would raise a presumption of the conscious indifference to consequences.' " 5 Am. Jur. 635, sec. 241.

"The continued or protracted failure of the operator to maintain a proper lookout along the road ahead of his vehicle may constitute gross negligence." 4 Blashfield, Automobile Law (Perm. ed.) 129, sec. 2327. See, also, *Kaley v. Huntley,* 333 Mo. 771, 63 S. W. (2d) 21; *Richards v. Richards,* 86 N. H. 273, 166 Atl. 823.

In a case in which the driver of the car negligently turned her head away from the road, and was looking in a direction almost opposite to which she was traveling, it was held that a directed verdict for the defendant should be reversed, as such conduct and inattention amounted to gross negligence. *Pitcher v. Curtis,* 43 Ga. App. 622, 159 S. E. 783.

We have set out the substance of the evidence, which was conflicting, but on which the jury found against the defendant on the questions of fact and returned a verdict for the plaintiff.

The question of gross negligence is for the jury where the evidence relating thereto is conflicting, and from which reasonable minds might draw different conclusions. If plaintiff warned the defendant to drive more slowly and, in dis-

regard of such warning, defendant lost control of the car, this would be one of the facts which the jury could consider in determining whether gross negligence existed. The district judge seems to have conducted this trial with great care, and to have protected the defendant in all the rights to which he was entitled. We have held many times that, where the evidence was conflicting, a verdict of a jury based thereon will not be disturbed unless it is clearly wrong. We find no prejudicial error which would warrant a reversal of this judgment, and the same is

AFFIRMED.

CARTER, J., concurs in the result.

STATE BANK OF JANSEN, APPELLEE, V. PETER J. THIESSEN, APPELLANT.
289 N. W. 791

FILED JANUARY 19, 1940. No. 30694.

Wills. A devise of real estate to a designated person "and his heirs forever," without power to sell, mortgage or otherwise encumber, vests such designated person with a fee simple title. The restraints against alienation contained therein are repugnant to the estate devised and are therefore void.

APPEAL from the district court for Jefferson county: CLOYDE B. ELLIS, JUDGE. *Affirmed.*

Hartigan & Skultety, for appellant.

W. J. Moss and *Melvin Moss, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and JOHNSEN, JJ., and FALLOON, District Judge.

CARTER, J.

This is an appeal from a decree of the district court for Jefferson county requiring the defendant to specifically perform the terms of a contract for the sale of real estate by accepting the title and paying the purchase price due by its terms.

The question to be decided arises out of the following

state of facts: On October 25, 1917, one Ferdinand Ackmann died, leaving a will by which he devised the property in question to Earnest Ackmann in the following words: "To my son Earnest Ackmann, subject to the rights of my wife set out in paragraph two hereof, and without any power or right in the said Earnest Ackmann to sell, mortgage or otherwise encumber said land, I give, devise and bequeath the (lands involved herein) to have and to hold subject to said conditions to the said Earnest Ackmann and his heirs forever." The life estate devised to the wife of Ferdinand Ackmann was extinguished by her death on June 11, 1929. The will of Ferdinand Ackmann has been duly probated and his estate settled, completed and closed.

On December 23, 1932, Earnest Ackmann and wife mortgaged the land to plaintiff for the sum of $3,500. The mortgage was subsequently foreclosed and the sale thereof to plaintiff confirmed. On February 16, 1939, plaintiff sold the land to the defendant for $4,000, in which contract plaintiff agreed to furnish an abstract of title showing a marketable title in the seller. The defendant refused to accept the title as marketable for the reason that the provision of the will through which plaintiff claims title restrains the devisee from selling, mortgaging or otherwise encumbering said lands and that the mortgage given to plaintiff was therefore void and of no force and effect. The question for determination, therefore, is the nature of the estate devised to Earnest Ackmann by the will of his father, and the effect of the restrictions against alienation with which the testator attempted to qualify it.

It is a fundamental rule when an estate in fee simple is devised that an attempt by the testator to prevent alienation is ineffective and void for the reason that it is repugnant to the estate devised. *Yates v. Yates,* 104 Neb. 678, 178 N. W. 262; *Myers v. Myers*, 109 Neb. 230, 190 N. W. 491. Therefore, if the estate taken by Earnest Ackmann under the will was in fee simple, the restrictions against alienation contained therein are void, and plaintiff has a marketable title.

A person is a purchaser, or takes land by purchase, irrespective of whether the conveyance is based on a consideration, when his interest is derived from a conveyance operating directly in his favor, by virtue of which the interest is created in him. If his interest is derived by inheritance from another person, he takes by descent and not by purchase. Whether in a given conveyance a limitation to the heirs of a designated person creates an estate in such heirs as purchasers, or whether such a limitation operates to create an estate in fee simple absolute, depends upon the form of the limitation. If there is no expression of an intent to create one estate in the designated person and a separate estate in his heirs, then the use of the word "heirs" serves merely to determine the extent of the estate created in the designated person. Thus, in the usual limitation of an estate to a designated person and his heirs forever, the phrase "and his heirs forever" are words of limitation and not of purchase, and operate to create an estate in fee simple absolute in such designated person. Restatement, Property, sec. 30, comment *c*. In the case before us this result must obtain, whether the rule in *Shelley's* case or the intent statute (section 76-109, Comp. St. 1929) be applied.

We necessarily hold that Earnest Ackmann took a fee simple title absolute in the lands devised to him by the will of his father, Ferdinand Ackmann. Consequently, the restraints against alienation attempted in the devise are void. The trial court therefore correctly decreed that plaintiff was entitled to have its contract with the defendant specifically performed.

AFFIRMED.

FRED MEYERS, JR., APPELLEE, V. FORREST NEELD, APPELLANT.
289 N. W. 797

FILED JANUARY 19, 1940. No. 30740.

Automobiles. Where the evidence and circumstances fail to disclose that either party is at fault, when an accident occurs, then the

accident is unavoidable and no recovery may be had. The mere fact that an accident occurs raises no presumption that it was the negligence of either party which caused the injuries complained of.

APPEAL from the district court for Richardson county: VIRGIL FALLOON, JUDGE. *Reversed.*

Henry F. Schepman and *John C. Mullen,* for appellant.

Jean B. Cain, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

This is an action for damages wherein the plaintiff charged the defendant with negligence, proximately causing injuries to him as the result of a collision with defendant's automobile while plaintiff was riding a horse. The cause was submitted to a jury, resulting in a verdict for plaintiff, assessing his damages in the sum of $1,250, and finding against the defendant on his cross-petition. Motion for a new trial was overruled, and defendant appeals.

The record discloses that about 4:30 o'clock in the evening of January 27, 1938, the plaintiff, a farmer, was riding a saddle-horse, 10 or 12 years old, weight about 1,100 pounds, carrying a saddle weighing 60 to 70 pounds, north on the east or right-hand side of paved highway No. 73, on the dirt shoulder thereof. He had traveled the highway on many occasions, taking cattle to and from the pasture each morning and evening. Just prior to the accident, he proceeded around a concrete spillway, which the horse would not jump, and, as he did so, he looked back, saw the defendant's automobile approaching from a distance of 200 feet at a speed of 35 or 40 miles an hour. Defendant and his wife were proceeding north on the highway to Verdon, where they lived.

The plaintiff's testimony with reference to the accident is in substance as follows: The horse shied a little bit at a card-board box lying in a ditch; the horse's foot slipped off the edge of the curb of the pavement; defendant's car hit

the horse, caught its left hind leg and threw the plaintiff and the horse backward; the plaintiff fell to the pavement on his elbow, resulting in permanent injury to his arm. Knowing his arm was broken, he got up, telling the defendant to catch the horse and tie it to a fence on the east side of the road, which he did. Defendant then took the plaintiff to his home.

Defendant, in relating his version of the accident, testified: They were following at a distance of about 12 feet behind a truck which was proceeding north. The horse apparently became frightened at a big box, shied into the truck, "jerked the handle off the truck," causing the horse and rider "to come back." The truck stopped the horse and rider temporarily; they then came back and struck the right-hand side of defendant's car, damaging a lamp; the car moved across the pavement eight or ten feet before it stopped. Defendant's wife corroborated his testimony, stating that she saw plaintiff riding his horse along the edge of the road ahead of their car, which was traveling slowly; that all of a sudden the horse "started to shy with its back, rear end to the west and it just kept on going sideways and backed, and there was a truck just ahead of us and it was coming into the truck and it just kept coming and it sort of sideswiped our car when he hit the lamp on the side, he sort of slipped down on his hind feet and he got his footing again and then he just backed to the car; * * * my husband just stopped it, he was off the pavement on the west side of the pavement; my husband jumped right out and helped him;" that the plaintiff was pulling back on the reins; the car stopped with the left front wheel on the west side of the pavement, and plaintiff and his horse were back of the car.

The only disinterested eyewitness, one Stouffer, testified that he was riding in the rear end of a telephone truck, proceeding south on the highway; that he was facing north; that they passed the plaintiff, who was on the "east side of the road on the shoulder, edge of the road;" that as plaintiff got by 50 to 100 yards, a car passed; that about that time the horse became frightened at something and started back-

ing onto the pavement. In response to the question: "Did the horse and car collide?" the witness replied: "Well, yes; not right at that time though; more to the west side of the pavement and the horse continued backing across and the way I could see it and the way it looked to me as though the horse backed into the car;" the truck did not hit the horse. Other evidence is to the effect that admissions were made by the defendant to the plaintiff, his father and his wife, that he hit the horse and rider, and his subsequent denial of such statement, by saying that the truck struck the horse.

Defendant's version of the accident, as to the truck traveling north, is not sustained by the evidence. Likewise, the evidence as to whether the horse had been dragged along the east side of the pavement for 30 feet or more is not clear. The eyewitness did not see the car carrying or dragging the horse, and, under the circumstances, this evidence is highly questionable. The evidence is conclusive that the horse could not run after the accident, but could hobble on three legs; its left hind leg was broken in two places, and out of joint at the hip. Plaintiff's testimony also shows the width of the pavement to be 18 or 19 feet, leaving the entire distance thereof to permit the defendant to drive around the horse. No contention is made as to either party being placed in a position of peril, nor was the doctrine of the last clear chance pleaded or contended for.

Negligence consists in the doing of some act, under circumstances surrounding the accident involved, which a man of ordinary prudence would not have done, or the failure to do some act or take some precaution which a man of ordinary prudence would have done or taken. The evidence shows that both the plaintiff and the defendant were acquainted with and knew the propensities of horses. It would seem clear that the rider of the horse in the instant case could not anticipate or expect that a paper box, flying through the air or lying in a ditch, would frighten the horse and cause it to shy. There is no evidence to show that the horse was a fractious horse and easily frightened.

The evidence fails to show any negligence on the part of the plaintiff.

The only time the plaintiff judged the speed of defendant's car was when he glanced back as he was maneuvering the horse around the spillway. The scene of the accident is approximately 25 to 30 feet north of the spillway, indicating that the defendant's car traveled a distance of over 200 feet, while the plaintiff and his horse traveled 25 to 30 feet. The deduction is, therefore, that the evidence fails to show excessive speed of defendant's car. There is no other evidence with reference to speed of the car than that herein related. No act on the part of the defendant in operating his automobile caused the horse to become frightened, to shy or walk backwards, or slip with his right hind foot off the shoulder of the road. The defendant could in no way anticipate the actions of the horse, under the circumstances, as he sought to pass it. Both the horse and its rider had a right to use that portion of the highway that they were using; likewise, the defendant and his wife had a right to use that part of the highway on which they were traveling at the time of the accident; so, we have no negligence in this respect.

In order that plaintiff may recover, it must be established by a preponderance of the evidence that, except for the negligence of the defendant, the accident would not have occurred. The most that can be said, under the facts in this case, is that the accident was unavoidable, and the mere fact that the accident happened raises no presumption that it was the negligence of either party which caused the injuries complained of. It frequently happens that accidents are unavoidable. The evidence fails to disclose which party, if either, is at fault.

"It is essential to the existence of negligence that there be some fault on the part of the person sought to be held liable; no liability exists for an unavoidable accident." 5 Am. Jur. 594, sec. 162.

"Where it is impossible to infer negligence from the established facts without reasoning irrationally and con-

trary to common sense and the experience of average men, it is not a question for the jury, and the court should direct a verdict for the defendant." *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb. 642, 54 N. W. 976.

As stated in *Turner v. Bennett*, 161 Ia. 379, 142 N. W. 999, we are not disposed to open the door of mitigation to heedless conduct on the part of any automobile driver. In an emergency it is often true that he has the advantage over the rider of a horse. But the right of each to use the road is precisely equal to that of the other. Neither can be held liable for a mere accident occurring through no fault on his part.

We conclude that the trial court was in error in submitting the cause to the jury. Its judgment is therefore reversed and the cause remanded.

REVERSED.

ROSE, J., dissenting.

As found by the jury on ample competent evidence, defendant, in my judgment, was guilty of actionable negligence in driving his automobile at an excessive speed in a place of danger close to the east curb of the pavement against plaintiff's horse, when nearly all of the paved roadway was a place of safety, being entirely free from traffic at the time.

Plaintiff had a right to ride horseback on the pavement, but rode on the unpaved shoulder of the highway except while going around the concrete spillway which was too wide for the horse to jump. It shied at a paper box; upon returning to the shoulder of the highway, its left rear hoof slipping back over the curb to the pavement. The horse's left rear leg and hip were broken when struck by defendant's automobile close to the east curb. Before leaving the shoulder of the pavement to make the short curve around the spillway, plaintiff looked backward and saw defendant's car approaching at a distance of about 200 feet. Except for the negligence of defendant, plaintiff would have avoided danger by going around the spillway. Defendant negligently drove his car into the place of danger without any excuse

for doing so. He was in the rear where he could see the horse and the rider and the roadway. The driving of the automobile close to the horse at the time and place under the circumstances was negligence for which the jury properly found defendant liable for resulting injuries and damages suffered by plaintiff.

Defendant was a farmer and knew the inherent tendency of a horse to shy suddenly when frightened, or was chargeable with such knowledge. Scientists account for this wild trait in the domesticated horse by the tendency of progenitors to shy when in panic from fear of ancient enemies in the native habitat of the aborigines. The rattle of reeds and the swish of long grass, where powerful wild animals waited in ambush to pounce upon their prey, were signals for the wild horse to jump aside and flee for life. The rattle of paper or the sight of a strange object may produce the same fear. This natural tendency to shy, jump aside and run to escape danger as the result of fright has been transmitted through domestication to the remotest progeny of the equine family. Whatever may have been the origin of this wild trait, the fact of it in the domesticated horse is common knowledge chargeable to motorists on the highways. Entertaining these views, I cannot concur in the opinion of the majority of the court. The judgment should have been affirmed.

JAY J. SHAMBAUGH, APPELLEE, V. BUFFALO COUNTY, APPELLANT.

289 N. W. 873

FILED JANUARY 26, 1940. No. 30723.

1. **Pleading.** By moving for a judgment on the pleadings, plaintiff admits the facts well pleaded by the defendant.
2. **Counties.** Under the provisions of section 33-131, Comp. St. 1929, the annual salary which a county treasurer is entitled to receive depends upon the population of the county for the year in question.
3. ———. In the absence of a judicial determination of the popu-

lation of a county for a year in question, the matter becomes a question of fact to be determined the same as other fact questions.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Reversed.*

O. A. Drake, for appellant.

M. H. Worlock and *I. D. Beynon, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

SIMMONS, C. J.

This is an action to recover salary alleged to be due the plaintiff as a county officer. Judgment on the pleadings was rendered for the plaintiff. Defendant appeals.

The amended petition of the plaintiff alleges the legal organization of defendant county; that the plaintiff was elected county treasurer of defendant county for a term of four years commencing in January, 1931; that he duly qualified for said full term; that on December 12, 1916, and again on December (November) 19, 1924, the board of supervisors of defendant county adjudged and determined that the population of said county exceeded 25,000, which judgment remained in full force and effect from that time forth; that by statute the plaintiff was entitled to a salary in the sum of $3,000 per annum during the entire term of office; that he was paid a salary on said basis until July 1, 1931; that on July 15, 1931, the board of supervisors adopted a resolution to the effect that the population of said county was 24,318, and that the county officers be paid from said day as provided by law on the basis of said population; that, pursuant to said resolution, the plaintiff was thereafter paid a salary of $2,000 per annum; that a salary balance was due the plaintiff of $3,458.33 which had not been paid; that in an action commenced by this plaintiff in the district court for Buffalo county, and finally determined in this court on appeal, the action taken by the defendant's board of supervisors on July 15, 1931, purporting to find and adjudge that the population of Buffalo county was less than 25,000, was declared to be null and void (see *Sham-*

baugh v. Buffalo County, 133 Neb. 46, 274 N. W. 207); that plaintiff filed a claim against the defendant with its county clerk for said sum of $3,458.33, which claim was disallowed July 15, 1936; and that said action disallowing plaintiff's claim was appealed from. Plaintiff prayed for judgment against the defendant for said sum together with interest.

By amended answer, defendant alleges that the allegations of plaintiff's petition are insufficient to constitute a cause of action; admits its organization, the election of plaintiff as county treasurer, that he qualified for the full term, the payment of salary as alleged in the petition; and denies all other allegations except those specifically admitted and those not consistent with the allegations of the answer. Further answering, defendant alleges that any cause of action which plaintiff claims to have is barred by the statute of limitations; admits that the board of supervisors of defendant county adopted the resolutions of December 12, 1916, November 19, 1924, and July 15, 1931, as referred to in plaintiff's petition, and attaches copies thereof and incorporates them in the answer; admits the filing of the claim, its rejection and disallowance; and denies that it is indebted to the plaintiff in any amount. Further answering, the defendant alleges that the three resolutions set out constitute the only proceedings of any kind whereby the defendant ever attempted to fix or establish the population of the county; that each resolution is void because it fails to disclose personal notice to any one, or published notice in any form, of a private or public meeting, or to disclose that any officer whose compensation was at stake appeared, or to disclose the name of the supervisors, or to disclose the presence of a quorum. Further answering, defendant alleged that, during the four years previous to the plaintiff's term commencing in January, 1931, the defendant's board of supervisors did not ascertain or determine the number of inhabitants of defendant county for classifying and fixing compensation of officers, and that during each of the years, 1930 to 1934, inclusive, there were less than 25,000 inhabitants in Buffalo county.

Further answering, defendant alleges that, subsequent to the resolution of July 15, 1931, the plaintiff continued to perform his duties, received the reduced salary, that not until he filed his claim, did the plaintiff object or protest the amounts paid to and received by him, and that the plaintiff is now estopped to question or challenge the validity of said proceedings or claim any further amounts to be now due him.

By way of cross-petition, defendant alleged a loss of county money because of deposit in a bank that subsequently failed. (The issues presented by this cross-petition are not involved in this appeal.) Defendant prayed that plaintiff's petition be dismissed, that it have and recover from the plaintiff the sum so alleged to be lost and costs.

Plaintiff replying denies all allegations of the answer; denies that the resolutions adopted in 1916 and 1924 are void; and alleges that both of said resolutions have been involved in previous litigation in which the defendant was a party, to wit: *Buffalo County v. Bowker*, 111 Neb. 762, 197 N. W. 620, and *Gordon v. Lowry*, 116 Neb. 359, 217 N. W. 610; that it was therein adjudged and determined that said resolutions were valid and constituted a legal determination of the population of defendant county; that the validity of said resolutions is *res judicata* as to defendant county; that in *Shambaugh v. Buffalo County, supra*, the defendant county alleged it had previously been determined by the board of supervisors of defendant that the population of said county exceeded 25,000 in number and that salaries were paid pursuant thereto; that in the case of *Gordon v. Lowry, supra*, the defendant alleged that, on November 19, 1924, the board of supervisors of defendant county investigated and determined that the defendant county had a population exceeding 25,000, and that these allegations constitute judicial admissions conclusive upon the defendant as to the validity of the determination of population in the resolutions of 1916 and 1924. The plaintiff denied that during the years 1930 to 1934 there were less than 25,000 inhabitants in Buffalo county, and alleged that,

by reason of the determination in the resolutions of 1916 and 1924, the population had been determined at over 25,000 during said years; that said resolutions were in full force and effect during plaintiff's term of office; that the plaintiff was entitled to a salary of $3,000 per annum as fixed by statute, and that he was entitled to recover said salary by virtue of section 3, article I, and section 19, article III of the Constitution. Plaintiff further answered as to defendant's cross-petition.

Plaintiff moved for judgment on the pleadings "as to plaintiff's amended petition, defendant's amended answer, and plaintiff's reply." The trial court found that, "upon the statements contained in plaintiff's amended petition, the amended answer of the defendant, and plaintiff's reply, the plaintiff is entitled by law to judgment in his favor herein for * * * $4,344.52." A jury was waived as to the issues made by the cross-petition, trial was had to the court, and a finding made that there was due the defendant from the plaintiff the sum of $1,497.88. Judgment was rendered for the plaintiff in the sum of $2,846.64 and costs.

Defendant's motion for a new trial was overruled.

The applicable statute fixing the salary of a county treasurer is as follows: "In counties having more than six thousand five hundred population and less than twenty-five thousand population, the county treasurer shall be entitled to receive the sum of two thousand dollars per annum * * *; in counties having more than twenty-five thousand population and less than sixty thousand population the county treasurer shall be entitled to receive the sum of three thousand dollars per annum. * * * No county treasurer shall be entitled to draw (in) any one month more than one-twelfth of the total annual compensation provided for himself * * *." Comp. St. 1929, sec. 33-131.

By the provisions of the foregoing statute, the plaintiff was entitled to receive an annual salary, the amount of which depended upon the population of defendant county during each year that plaintiff served as county treasurer.

The amount of salary does not depend upon what the population previously had been, nor upon what it subsequently might be.

In *O'Connell v. Sioux County*, 94 Neb. 826, 144 N. W. 779, this court said: "The salary of the county attorney for any year depends upon the number of inhabitants of the county during that year, and that fact is to be determined, as are other facts in litigation, by the best competent evidence that can be adduced under the circumstances." Applying that language to the instant case: The salary of the county treasurer for any year depends upon the number of inhabitants of the county during the year, and that fact is to be determined, as are other facts in litigation, by the best competent evidence that can be adduced under the circumstances. See, also, *Buffalo County v. Bowker, supra.*

By moving for a judgment on the pleadings, plaintiff admits the facts well pleaded by the defendant. *Abrahams v. Studebaker Corporation*, 113 Neb. 721, 204 N. W. 786.

The affirmative allegations of the answer are: (1) Bar by the statute of limitations; (2) that the resolutions of 1916, 1924, and 1931 are void, and that the population had not been otherwise determined; (3) that from 1930 to 1934 the population was less than 25,000; (4) estoppel of the plaintiff by the acceptance of the reduced salary without objection or protest.

Plaintiff contends that the findings and determination of the board of supervisors of defendant county made in 1916 and 1924 were judicial determinations of population, not subject to collateral attack, and are conclusive as to those to whom they apply until set aside or vacated by the board, or some other forum of competent jurisdiction, in a direct proceeding instituted for that purpose (see *Buffalo County v. Bowker, supra*); and that the defendant is making a collateral attack thereon. Defendant contends that the orders of 1916 and 1924 are void for want of jurisdiction and subject to the attack here made.

We do not find it necessary to decide the above question. Assuming, but not deciding, that plaintiff's theory is cor-

rect, and that the 1916 and 1924 resolutions are in full force and effect, it does not follow that plaintiff was entitled, as a matter of law, to judgment on the pleadings.

Defendant's answer specifically presented the issue of the population of defendant county from 1930 to 1934, inclusive. It alleged "that during each of the years of 1930, 1931, 1932, 1933 and 1934 there were respectively less than 25,000 inhabitants in Buffalo county." The December 12, 1916, resolution declared that the population of defendant county on November 7, 1916, "did and now does exceed the number of twenty-five thousand inhabitants." The resolution of November 19, 1924, declared that the population of defendant county "then (November 1, 1924) and now does exceed the number of 25,000 inhabitants." The most that can be claimed for the resolutions of 1916 and 1924 is that they determine the population as of those dates. They are not judicial determinations of what the population will be at some future date. A conclusive determination of the population as of 1916 and 1924 is not a conclusive determination of the population as of 1930 to 1934. We cannot close our minds to the obvious fact that populations in counties increase and decrease from many causes—change in number is constant. Obviously, over a period of years there will be change in the population of defendant county.

The changing status of population has been recognized throughout our decisions. In *Shambaugh v. Buffalo County, supra,* this court in discussing the 1931 resolution said: "For anything appearing in the record, plaintiffs may have been ready, able and willing to prove conclusively that numbers sufficient to increase the population far beyond 25,000 became residents of Buffalo county after the census was taken and before the resolution was adopted, thus showing the fact to be contrary to the recital therein." Applying the above language to the instant case, for anything appearing in the record, defendant may have been ready, able and willing to prove conclusively that numbers sufficient to decrease the population far below 25,000 had ceased to be residents of Buffalo county after the resolutions of

1916 and 1924 were passed, thus showing the fact to be contrary to the recital therein. See, also, *Kokes v. State*, 55 Neb. 691, 76 N. W. 467; *State v. Long*, 17 Neb. 502, 23 N. W. 337. (The above statement must not be construed as a determination of the question of where the burden of proof rests. That matter is not before us.)

There is then no judicial determination by the board of supervisors, or other forum, of the population of the defendant county for the years in question. The matter then becomes a question of fact to be determined the same as other fact questions. *Gordon v. Lowry, supra*; *Kokes v. State, supra*; *State v. Long, supra.*

There is no conflict in the conclusion here reached with that in *Buffalo County v. Bowker, supra.* There, compensation was fixed upon the basis of the population as determined by the 1916 resolution. But this court there pointed out: "Since that date, up to and including the year 1920, the county board allowed all officers of the county to retain fees and salaries based upon a population of 25,000, and has fixed salaries of deputies and clerks in county offices based upon such population." There the county board had recognized a continuing population of 25,000 down to and including 1920, and this court accepted that recognition as establishing the fact of population as of 1920. In the instant case, the county board have not so recognized the population figure there determined for the years 1932, 1933, and 1934.

Neither does this conflict with the holding in *Gordon v. Lowry, supra,* for there the defendant by answer alleged that the defendant county "had a population of more than 24,000, ever since prior to November 1, 1924, and now has a population exceeding 24,000." (Quote taken from the transcript.) That allegation was admitted by the plaintiff's demurrer.

It follows that the trial court erred in sustaining the plaintiff's motion for judgment on the pleadings. Other matters presented need not now be determined.

REVERSED.

FARMERS STATE BANK OF EWING, APPELLANT, V. LYLE P. DIERKS ET AL., APPELLEES.
289 N. W. 860

FILED JANUARY 26, 1940. NO. 30730.

Fraudulent Conveyances. This is an action to set aside a conveyance of land. On trial *de novo* in this court, the evidence is examined, established principles of law are applied thereto, the conveyance is found to be fraudulent as to the plaintiff, and the decree of the trial court is reversed.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Reversed.*

Jackson & Rice, for appellant.

J. J. Harrington and *John M. Dierks, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

SIMMONS, C. J.

The plaintiff, a judgment creditor of the defendant M. H. Dierks, brought this action to set aside a conveyance of land from its debtor, M. H. Dierks, to his son, Lyle P. Dierks, a defendant. The defendants prevailed in the court below, and plaintiff appeals. For convenience, in reciting the evidence, the judgment debtor will be referred to herein as the father and his grantee as the son.

In its petition plaintiff alleges its corporate capacity; a loan to the father of $3,700, evidenced by promissory notes, the maturity of the notes, its demand for payment and his refusal to pay; suit upon said notes, the recovery of judgment thereon, that the judgment is final and unpaid; the relationship of the parties; the conveyance by the father to the son, after the maturity of the notes, but prior to the judgment, of approximately 4,000 acres of land in Holt and Wheeler counties "for the sole purpose and intent of hindering, delaying and defrauding the creditors of said M. H. Dierks, of their lawful rights and debts, and especially for the purpose and with the intent of hindering,

delaying and defrauding plaintiff herein in the collection of the aforesaid judgment and indebtedness;" that, by reason thereof, the conveyance is absolutely void as against the plaintiff. Plaintiff prayed that, as against it, the conveyance be annulled and set aside, that its judgment be decreed to be a lien upon the real estate superior to the interest and lien of the son, and for equitable relief.

The son (and his wife), answering plaintiff's petition, admits plaintiff's corporate capacity, the recovery of the judgment against the father, the relationship of the parties, the conveyance of the land in controversy from the father (and wife) to the defendant son, and the recording of the deed; and generally denies all other allegations of plaintiff's petition. Further answering, defendant son and his wife allege the sale and purchase of the land for a valuable and adequate consideration; that the son paid the full and fair market value for said land (reciting an alleged consideration to which he later testified); that the debts of the father to the son were actual, subsisting, and just obligations; that, in purchasing the land, he acted in good faith and for no other purpose than to secure his just demands owing him by the father; and that since October, 1937, the son has been the owner of the property. The son prays that plaintiff's action be dismissed.

The father, answering separately, admits that plaintiff recovered judgment against him; that no part of the judgment has been paid; the relationship of the parties; that the land was conveyed by him to his son and the deed recorded; and denies all other allegations of plaintiff's petition. Further answering, the father alleged that the conveyance in question here was made in good faith, for a fair and adequate consideration; that at the time of the conveyance he was indebted to the son (and sets out the alleged consideration in detail, to which he later testified); that the son is the owner of the land in fee simple; that the conveyance was made for the sole purpose of paying his obligations to his son, which were then "actual, honest and existing and just." The father prays that plaintiff's action be

dismissed. The reply was a denial of new matter in the answer.

The trial court found generally in favor of the defendants; that the transaction was in good faith; that the son paid the full and market value of the land; that the plaintiff's judgment is not a lien upon the real estate here involved, and dismissed plaintiff's action, at its cost.

Plaintiff filed a motion for a new trial, which was overruled.

At the beginning of the trial, it was stipulated that the value of the land, subject to the encumbrances of record at the time of the conveyance, was $8,794.39.

The trial court properly ruled that the burden of proof was upon the defendants. With one exception (noted hereafter) all evidence was offered by the defendants. The testimony of father and son may be summarized as follows: The father inherited this and other land from his father; the father was 66 years old at the time of trial, and all his life had been engaged in general ranching operations on the land here involved. His entire ranch was once free of indebtedness; in 1923 or 1924 he borrowed $25,000 from the Federal Land Bank and secured it by a mortgage on the entire property. In 1929 the father "had to have more money," so the ranch was "split" into what will be referred to herein as the north and the south ranch. At that time, the father conveyed the south ranch to the son. The title to the south ranch is not in issue in this action; however, that transaction and the handling of that land enter into the problem here presented. The north ranch, plus seven or eight hundred acres of unencumbered land, is the land involved in this action. This entire tract will be referred to herein as the north ranch.

As to the conveyance of the south ranch to the son, the father testified: "I was trying to get by with the Federal Land Bank." "I had to have more money, and the only way to get it was the Federal Land Bank would let us take sixteen hundred acres of that south ranch; * * * he (the son) could get ten thousand on that." The son borrowed the

$10,000 on the south ranch and turned that money over to his father. He made no other payment to his father for the conveyance of the south ranch. The father testified that, under oral lease from his son, he continued to operate the south ranch until 1934, when the son took over its operation. There were 800 acres of pasture and 800 acres of hay land on the south ranch. After the conveyance, the father used the pasture and paid the taxes on the entire south ranch "for the use of the pasture." (The disposition of the hay and the payment of interest on the land bank mortgage on the south ranch will be set out later herein.)

At the time of the conveyance of the south ranch to his son, the father borrowed $23,000 on the north ranch (excluding the unencumbered land), and in 1936 made a commissioners' loan thereon.

In 1937 the father was again behind in taxes and interest (he had never been able to meet his current obligations after he borrowed the first money); his cattle were mortgaged for more than their market value to an Omaha bank and were sold by it in June, 1937. That year the father discussed the matter of his loans with the plaintiff's cashier, who suggested that the father go to Omaha and discuss them with the land bank officials. That was done. Officials of the land bank suggested that the father "turn this land over to" his son, that his son kept his payments up and was young; that the father was "going to be around there anyway." The father and son studied it over and the father "deeded this land over to him" in October, 1937. The father, at that time, owed the plaintiff the debt upon which this action is based. The consideration recited in the deed was $6,566.77. Revenue stamps in the sum of $8.50 were attached to the deed.

The actual consideration claimed was the surrender to the father by the son of a promissory note made by the father payable to the son, dated March 10, 1932, for $5,566.77, due December 1, 1933, bearing interest at 5 per cent. *from maturity.* No interest or principal had been paid on the note, and the computed interest due was in excess of $1,000,

but figured in the settlement at $1,000. The principal sum plus $1,000 interest makes the alleged consideration recited in the deed. The other consideration claimed was the assumption and payment by the son of back taxes *on the land* and delinquent interest on the mortgages *on the land.* These four items making a total of more than $8,500, to which defendants add $21,849.39 and $5,000 principal due on the mortgages, reach a grand total in excess of $35,500 (approximately $9 per acre) which defendants contend the son paid for the land. The son testified that he assumed the obligations to the land bank and the commissioners' loan. However, the deed recites that the conveyance is subject to those encumbrances, unpaid interest, unpaid taxes, and tax liens.

The original note introduced in evidence by the defendants does not show an indorsement of payment. The history of the note and the consideration therefor testified to by the defendants is as follows: The father testified that he owed the son for three years' hay and three years' wages, and that he gave the son the note in March, 1932, "for what I owed him then." The note was made out by the son and signed by the father. The son worked for the father on a salary from February, 1929, to February, 1932. The father testified "I was paying him $100 a month." The son testified that his salary was "estimated." In any event, the father testified that he owed the son $3,600 for those three years' wages. The other alleged consideration for the note was the purchase by the father from the son of the son's share of the hay on the south ranch estimated at 350 tons for each of the years 1929, 1930, and 1931, figured at $5 a ton for 1929 ($1,750), $5 a ton for 1930 ($1,750), $8 a ton for 1931 ($2,800), a total of $6,300 for hay, to which defendants add the $3,600 for wages, making a grand total of $9,900 that the father testified he owed the son in March, 1932.

As against that total, credits were allowed first for payments of wages to the son. Payment was by check. The checks were destroyed. The check stubs were produced, but

not admitted in evidence, and it was stipulated that the father paid the son $900 in wages in 1929, $1,300 in 1930, $650 in 1931, and $50 in February, 1932 (a total of $2,900 in wages that had been paid). This leaves $700 alleged to be due as wages. It was also stipulated that the father paid interest to the land bank upon the mortgage debt on the south ranch of $181.25 in 1929, $625.48 in 1930, and $626.50 in 1931. The total of taxes and wages paid amounts to $4,333.23, for which the father claimed credit against his son in March, 1932, when the note was alleged to have been given. The father testified: "I paid him" wages and "I paid interest on his loan * * * on his land, because he had nothing but what he was getting from me to pay with." When the above credits are deducted there is a balance of $5,566.77, for which the note was given.

The hay which the father claims to have purchased from the son was harvested from the south ranch which the father conveyed to the son in 1929. The father testified that his son "put hay up on all my stuff and his own too, and he was getting half of the hay; they always put hay up at that time on halves." (This, however, was during the time that the son was being paid the "going wages" as ranch foreman for his father.) "There was eight hundred acres of hay at that time down on Lyle's (son) place; then I would pay him whatever this hay was worth; there was about three hundred and fifty tons of it, we figured each year * * *." The son testified that his father "bought half of my hay each year; he got the first half for putting it up and the second half he bought from me each year." As to the value of the hay, the son testified "he paid me $5 a ton for the hay" the first two years and "the third year hay was high and we estimated that the hay would be worth about $8 a ton."

On cross-examination, the father identified, and there were received in evidence, his property statements, showing assets and liabilities, given to the plaintiff and to the Omaha bank during the years here in question. The property statement given by the father to the Omaha bank on November

18, 1929, lists among his assets "1,500 T hay $6,000" ($4 per ton as against the $5 per ton calculated in arriving at the amount of the note). The property statement given the plaintiff by the father, dated November 16, 1931, shows "1,400 T hay $6.00 840.00" (should be $8,400); the property statement given the Omaha bank, dated January 30, 1932, shows "800 tons hay @5. $4,000," and a similar statement of November 1, 1933, shows "1,200 tons hay at $5.00 $6,000.00." (These values in the property statements are to be contrasted with the $8 per ton "estimated" as the value of the hay in calculating the amount of the note.)

These property statements were made for the purpose of bolstering credit for renewal and securing of loans. The land involved in this action is shown as an asset in the statements. The father testified that they were made out by plaintiff's and the Omaha bank's cashier. Obviously, they would show the father's assets in the best light; the father testified, "It wasn't unusual they made them out to make it look good to get your money." None of these statements shows the alleged indebtedness of the father to his son as evidenced by the note (however, it was testified that other unsecured indebtedness also was not shown). The father testified that he was told to put in the property statements only what he owed the banks and things of record; that "it would make it look better" to keep the "other stuff" out.

There is no testimony that the father ever told the plaintiff of this alleged indebtedness to the son. The plaintiff's cashier testified that he did not know of the alleged debt of the father to the son until after the deed here in question was recorded. There is no evidence that any one except the father and son ever saw the note or knew of its existence or the existence of the debt it is alleged to represent. Although the son denied knowledge of this debt of the father to the plaintiff, the evidence establishes that the son knew of his father's business conditions generally, that the father was insolvent when this conveyance was made, and that the son knew of that insolvency.

The son made no personal tax returns prior to 1934, did not at any time list this note for taxation, and did not make an income tax return to the federal government for 1937, the year the note was alleged to have been paid by the conveyance here in question.

Neither the father nor the son kept any books or other records of their indebtedness to each other. The credits which the father claimed as against the $9,900 alleged debt to the son were all shown by check-book stubs, as having been paid to or for the son.

Both father and son categorically testified that it was not their intention and that the conveyance was not made for the purpose of cheating, defrauding, hindering, or delaying the father's creditors in the collection of their debts.

The father further testified: "I couldn't keep it up so I *turned* it to him; the land had always been in my father's name and it was handed down; and I thought maybe he could work it out until he could hold it; I couldn't keep it any longer." The son testified that his father "had no way of carrying it, and I have had to assume the responsibility, and I had to have something to do it with;" and again, "I had put about fifteen years of work in there; I got my spending money for a while out there, and then my salary was estimated later on; but year after year I worked out there without any wages or anything but spending money."

After the conveyance of this land to the son in 1937, the father had no property left in his name and had no property at the time of the trial. He was asked, "And you don't ever intend to pay this debt, do you?" He answered, "It is according to what will happen, if *we* happen to have a downpour with plenty of rain and things pick up * * *."

The father now looks after both ranches for the son.

Upon a trial *de novo,* does equity require a cancelation of the deed as to the plaintiff?

"Every conveyance * * * in writing or otherwise, of any estate or interest in lands * * * made with the intent to hinder, delay or defraud creditors or persons, of their lawful rights, damages, forfeitures, debts or demands * * *

as against the persons so hindered, delayed or defrauded shall be void." Comp. St. 1929, sec. 36-401.

"The question of fraudulent intent in all cases arising under the provisions of this chapter shall be deemed a question of fact, and not of law, and no conveyance or charge shall be adjudged fraudulent, as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration." Comp. St. 1929, sec. 36-405.

"A debtor in failing or insolvent circumstances may prefer one creditor notwithstanding the fact it may be to the exclusion of others, and this rule may include relatives of the debtor who are his creditors." *National Bank of Commerce v. Chapman*, 50 Neb. 484, 70 N. W. 39.

However, "A deed by a father to his son is presumptively fraudulent as to an existing creditor, and in litigation between him and the parties to the conveyance over its alleged invalidity the burden is on them to establish the good faith of the transaction by a preponderance of the evidence." *Lincoln Trust Co. v. Sweeney*, 124 Neb. 686, 248 N. W. 67. See, also, *Riggs v. Hroch*, 133 Neb. 260, 274 N. W. 598.

"It is a well-established rule that, where a transfer of land is made by a debtor to a near relative in consideration of a past-due indebtedness, the burden rests upon the grantee in a creditor's suit to show that the debt was genuine, that his purpose was honest, and that he acted in good faith in obtaining title. Such transactions are looked upon with suspicion, and the suspicion continues until the grantee shows the good faith of the transfer by clear and satisfactory evidence. Generally, when the transaction is in fraud of creditors, knowledge thereof rests only with the near relatives, or others in privity with the debtor. *When the testimony relied upon to show good faith is given by interested relatives only, the reasonableness or unreasonableness of their evidence has considerable weight in arriving at a just conclusion.*" *Flint v. Chaloupka*, 78 Neb. 594, 111 N. W. 465.

We have then a conveyance that is presumptively fraudulent. Two considerations are claimed: One is the taking

of the land subject to certain past-due indebtedness and taxes which the son has subsequently paid. This, however, is in the same category as the mortgages against the property. It is not in the classification of a payment moving from the son to the father. The other alleged consideration is a past-due indebtedness, and is the only consideration referred to in the deed. The major consideration for the note was the hay which the son is alleged to have sold the father. This hay was harvested on land which the father conveyed to the son in order that it might be used to secure a loan which a lender would not make to the father, but would make to the son. The father received the entire proceeds of the loan, and thereafter, for the period covered by the transaction involved in the note, the father paid the taxes on the land and the interest payments to the mortgagee. These are charges which the father would have been called upon to pay had he personally secured the loan and continued as the record owner. The father continued to operate the south ranch after the conveyance. The father's testimony indicates that the hay, claimed to have been purchased from the son, was the son's share for harvesting the hay. This testimony is inconsistent with the claim that the son was an employee of the father, and is in conflict with the son's statement that the father received half of the hay "for putting it up" and bought the son's (landlord's) share, being the other half. There are the following additional facts that cast doubt upon this transaction and the execution of this note, alleged to have been made five and one-half years before the conveyance, and upon the testimony that the note was given for the consideration shown and at the time claimed. (1) The difference between the price of the hay, "estimated" in arriving at the amount of the note, and the value of hay shown on the property statements. (2) Neither father nor son kept any books of record, every credit given the father was evidenced by payment by check, and not one cent was credited otherwise. (3) The note did not provide for the payment of interest for the first 20 months. (4) Without the note, the alleged

debt would have been barred by the statute of limitations at the time of the conveyance—a circumstance which we have the right to consider in determining the good faith of the transaction (27 C. J. 539). (5) The secrecy surrounding the transaction and the existence of the alleged debt and note evidencing it. (6) The original note, in evidence, bears no indorsement of payment at the time of its surrender to the father. (7) There was no change, known to any one except father and son, in the operation of the south ranch following the conveyance of 1929, and no shifting from the father to the son of the primary task of meeting current obligations thereon. This evidence considered as a whole points to the conclusion that the hay belonged to the father, not the son, and that the alleged sale of the hay to the father was an afterthought in time of trouble.

There remains the matter of a balance of $700 which both father and son testify was owing to the son for wages. The defendants' testimony as to the origin of this balance of the debt, as set out herein, is far from satisfactory. It is intermingled with and subject to the same criticism that we express as to the hay transaction. However, accepting the claim of wages due, it can be but for $700 and interest as against a stipulated value of $8,794.39 for the land conveyed. As to that, this court has held:

"In a contest between a vendee and creditors of the vendor, the adequacy of the consideration, if it be a valuable consideration, will not be inquired into except for the purpose of throwing light on the intention of the parties." *Jones v. Dunbar*, 52 Neb. 151, 71 N. W. 976.

However, "It is not proper for a creditor to receive in settlement of his debt against an insolvent debtor property materially greater in value than the debt paid thereby." *Slosburg v. Hunter*, 136 Neb. 324, 285 N. W. 563.

Gross inadequacy of consideration is a badge of fraud and a circumstance tending to show knowledge of fraud and participation in it. 27 C. J. 484.

We reach the conclusion that there is no adequate consideration shown for the conveyance from the father to his son.

"Fraudulent intent may be established by proof of facts from which such inference may be reasonably drawn." *Peterson v. Wahlquist,* 125 Neb. 247, 249 N. W. 678; *Riggs v. Hroch, supra.*

"'A conveyance is declared to be fraudulent when its object or effect is to defraud another, or the intent with which it is made is to avoid some duty or debt due by or incumbent upon the party making the transfer.' 27 C. J. 415." *Butke v. Nachschoen,* 133 Neb. 366, 275 N. W. 318; *Farmers Elevator Co. v. Peck,* 134 Neb. 305, 278 N. W. 499.

"We do not understand the rule to be that it is necessary to prove a specific intent. The intent may be gathered from the acts of the parties, and a conveyance becomes fraudulent in law when it is shown that it was made for the purpose of placing the property beyond the reach of creditors, or that it would hinder or delay them in collecting their just demands." *Becker v. Linton,* 80 Neb. 655, 666, 114 N. W. 928.

"As to an existing creditor, a conveyance by the debtor to delay collection of the debt is declared by statute to be void. Comp. St. 1929, sec. 36-401." *Lincoln Trust Co. v. Sweeney, supra.*

What was the intent and the effect of this conveyance? Looking at the situation generally, we have a father who inherited land from his father and who desired to pass it down to his son. Once prosperous, he became financially involved and conveyed a part of his land to his son to secure needed finances. Repeated losses continued an inability to meet his obligations as they accrued and finally produced insolvency, the sale of his cattle, etc., by secured creditors, and the conveyance of his remaining land to his son. The testimony shows that the conveyance was to withdraw the land from the reach of unsecured creditors, to preserve the land from secured creditors, and to preserve an admitted equity therein for the son, if not for the father and son. The evidence of the origin of the debt that constitutes the foundation of the claim of the son is unsatisfactory and unconvincing. It is obvious that the conveyance to the son

has not only delayed, but, if permitted to stand, has the effect of entirely preventing the plaintiff from the collection of its judgment by execution at law.

Such is its natural and obvious result. The proper conclusion is that the father and son intended that such a result would follow from the conveyance. The law wraps a presumption of fraud around a transaction of this character. The defendants have failed to overcome and remove that presumption. It follows that the conveyance, as against this plaintiff, is void, and that the plaintiff was entitled to the relief for which it prayed.

The decree of the district court is reversed, and, as against the plaintiff, the conveyance to the defendant Lyle P. Dierks of the land described in plaintiff's petition is declared null and void, and is annulled and set aside. All costs are taxed to the defendants Lyle P. Dierks and M. H. Dierks.

REVERSED AND REMANDED.

FEDERAL FARM MORTGAGE CORPORATION, APPELLEE, V. FRANK B. HUGHES ET AL., APPELLANTS.

289 N. W. 866

FILED JANUARY 26, 1940. NO. 30722.

1. **Bills and Notes.** A statutory rule of pleading provides that, in an action on a promissory note, it shall be sufficient to produce a copy of the instrument, with all the credits and indorsements on it, and to state that there is due thereon to plaintiff from defendant, the maker, a specified sum which is claimed with interest. Comp. St. 1929, sec. 20-837.
2. **Attachment.** In a civil suit for the recovery of money, property of a nonresident defendant may be attached at or after commencement of the action. Comp. St. 1929, sec. 20-1001.
3. **Appeal.** On appeal, the proceedings in the district court are presumed to be free from error, in absence of a record showing the contrary.
4. **Mortgages.** "The holder of a note, which is secured by a mortgage, may maintain an action at law on the note, where neither note nor mortgage contains stipulations making the mortgaged

property primarily liable for the debt." *Grable v. Beatty*, 56 Neb. 642, 77 N. W. 49.

5. ———. "In the absence of an agreement by a mortgagee to look primarily to his security for satisfaction of the debt, a foreclosure of the mortgage is not a condition precedent to an action at law on the secured claim." *Grable v. Beatty*, 56 Neb. 642, 77 N. W. 49.
6. **Evidence.** Nebraska courts may take judicial notice of federal statutes and proclamations of the president.
7. **Constitutional Law.** Where the makers of a promissory note invoke acts of congress to procure a loan evidenced by such note, they are not in a position to question the validity of those acts to prevent repayment of the money thus borrowed.
8. **Bills and Notes.** Where payment is pleaded by defendants as a defense to an action on a promissory note executed by them and delivered to payee, the burden is on them to prove they paid the debt to the holder of the note or to an agent authorized to receive payment.

APPEAL from the district court for Cuming county: ADOLPH E. WENKE, JUDGE. *Affirmed.*

A. R. Oleson, for appellants.

Moodie & Burke, Philip M. Wellman and *Franklin L. Pierce, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

ROSE, J.

This is an action at law commenced in the district court for Cuming county on a promissory note dated September 13, 1934. The note provided for payment of $2,300 and interest at the rate of 5 per cent. per annum on the unpaid debt, the principal being payable in 20 semi-annual instalments of $115 each, the first maturing January 1, 1938, and the last July 1, 1947, but all to become due and payable by election of the holder upon default in payment of interest or of any instalment.

The note on its face is payable to "Land Bank Commissioner, acting pursuant to part 3 of the Act of Congress known as the 'Emergency Farm Mortgage Act of 1933,' at

his office in the city of Omaha." It is alleged in the petition that the Federal Farm Mortgage Corporation is the holder of the note. Plaintiff alleges further:

"It is a corporation, duly organized and existing under an Act of Congress, more particularly known as the Federal Farm Mortgage Corporation Act (12 U. S. C. Sec. 1020 *et seq.*) and that the principal place of business and office of the plaintiff is located in the city of Washington, District of Columbia; that the Land Bank Commissioner is an office of the Farm Credit Administration, an executive and administrative agency of the government of the United States of America, which office was created by Sec. 3 of the Federal Farm Loan Act (12 U. S. C. 653), said office at that time being known as the office of the Farm Loan Commissioner and per executive order of the President of the United States of America, 6084, this office was transferred from the treasury department of the United States to the Farm Credit Administration. The name of the office of the Farm Loan Commissioner was changed to that of the Land Bank Commissioner by Sec. 80 of the Farm Credit Act of 1933 (12 U. S. C. 638-a) and all the duties previously conferred upon the incumbent of the office by the Emergency Farm Mortgage Act of 1933 were made subject to the terms and conditions of executive order #6084, by Sec. 80 (a) of the Farm Credit Act of 1933 (12 U. S. C. 637)."

Frank B. Hughes and Mary E. Hughes, defendants, procured the loan and executed and delivered the note. Under an attachment issued by the clerk of the district court, the sheriff seized for the benefit of plaintiff property of defendants who were non-residents of Nebraska.

Defendants assailed the petition by demurrer; moved to dissolve the attachment; pleaded payment, unconstitutionality of the federal statute authorizing the loan, and alleged that plaintiff is not the real party in interest. The reply to the answer was a general denial.

The district court overruled the demurrer and the motion to quash the attachment and upon a trial of the cause gave the jury a peremptory instruction in favor of plaintiff.

From judgment on the directed verdict for unpaid debt and interest amounting to $2,562.11, defendants appealed.

The petition conformed to the statutory rule which provides that, in an action on a promissory note, it shall be sufficient to produce a copy of the instrument, with all the credits and indorsements on it, and to state that there is due thereon to plaintiff from defendant, the maker, a specified sum which is claimed with interest. Comp. St. 1929, sec. 20-837. The petition alleged the corporate capacity of plaintiff; the execution and delivery of the note by defendants; ownership by plaintiff; amount of unpaid debt and interest; default in payment of interest and in payment of instalment due January 1, 1938; election maturing entire debt on account of the defaults; copy of note and indorsements thereon as part of the petition which shows its sufficiency under the statutory rule of pleading. Error in the overruling of the demurrer has not been found.

An assignment of error challenging the overruling of the motion to quash the attachment is also without merit. A Nebraska statute provides that, in a civil suit for the recovery of money, property of a nonresident defendant may be attached at or after the commencement of the action. Comp. St. 1929, sec. 20-1001. As already explained, a valid unpaid claim for money due from defendants to plaintiff is pleaded in the petition. The affidavit and order for the attachment and the return of the sheriff are not in the record for review, but the writ of attachment recites that the necessary affidavit was made. The answer of defendants to the petition shows that defendants are nonresidents. On appeal, the proceedings in the district court are presumed to be free from error, in absence of a record affirmatively showing the contrary. A valid claim and a ground for the attachment are definitely shown without disclosing error.

Defendants contend that foreclosure of a mortgage was the remedy authorized by the note to enforce payment of it in the event of default and consequently that the action at law is not maintainable. The law applicable to this contention was formerly stated as follows:

"The holder of a note, which is secured by a mortgage, may maintain an action at law on the note, where neither note nor mortgage contains stipulations making the mortgaged property primarily liable for the debt.

"In the absence of an agreement by a mortgagee to look primarily to his security for satisfaction of the debt, a foreclosure of the mortgage is not a condition precedent to an action at law on the secured claim." *Grable v. Beatty,* 56 Neb. 642, 77 N. W. 49.

Plaintiff is not seeking any relief under a mortgage. Neither the mortgage to which the note refers nor a copy thereof is in the record. Its terms as to remedy, if any, are not disclosed. The note itself does not contain a stipulation making mortgaged property primarily liable for the debt. It follows that a defense on this ground is not disclosed by the record.

Another contention to defeat a recovery on the note is that plaintiff failed to prove its allegations relating to the powers and duties of the "Land Bank Commissioner," payee, and of the "Federal Farm Mortgage Corporation," plaintiff, under the acts of congress and the executive order cited in the paragraph hereinbefore quoted from the petition. The futility of this contention is shown by the rule that Nebraska courts may take judicial notice of federal statutes and of proclamations of the president. *National Supply Co. v. Chicago & N. W. R. Co.,* 108 Neb. 326, 187 N. W. 917. These sources of power, cited in the petition, show authority for the loan in controversy and for the transfer of the note to plaintiff, including its right to sue thereon.

Federal enactments invoked by plaintiff to maintain its action at law on the note are denounced by defendants as unlawful and void on the ground that the federal government has no power under the Constitution to go into the business of lending money to private individuals for private purposes having no connection with any governmental function.

Defendants, having invoked the acts of congress to procure the loan, are not in a position to question the validity

of those acts for the purpose of evading repayment of the money thus borrowed. *LaBorde v. Farmers State Bank*, 116 Neb. 33, 215 N. W. 559.

Payment was pleaded as a defense, but not proved. The evidence shows that defendants had other federal loans secured by mortgages on different farms owned by them. Several payments had been made, but their application to plaintiff's note herein were not shown, except as indorsed on the note itself and credited on the debt evidenced by the judgment. Where payment is pleaded by defendants as a defense to an action on a promissory note executed by them and delivered to payee, the burden is on them to prove they paid the debt to the holder of the note or to an agent authorized to receive payment.

The assignments of error presented by the brief and argued at the bar have been examined and considered without finding an error prejudicial to defendants.

AFFIRMED.

BARTON H. KUHNS, TRUSTEE, APPELLANT, V. LIVE STOCK NATIONAL BANK OF OMAHA, APPELLEE.

289 N. W. 893

FILED JANUARY 26, 1940. No. 30715.

1. **Bills and Notes.** The payment of a check by the drawee bank is not a negotiation, and does not make the bank a holder in due course.
2. **Corporations.** A resolution of the board of directors of a corporation authorizing a bank to honor instruments, even if drawn to the individual order of certain officers named therein, does not, as a matter of law, relieve the bank from making inquiry if an officer of the corporation offers to pay his individual notes to said bank with a check on the corporation account therein, for if it is an unauthorized use of the funds of the corporation the bank may be held liable therefor.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Reversed.*

Young & Williams, for appellant.

Dorsey & Baldrige and *Crofoot, Fraser, Connolly & Stryker, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

PAINE, J.

This is an action at law, in which Barton H. Kuhns, plaintiff-appellant, as trustee in bankruptcy of Central Bridge & Construction Company, a bankrupt corporation, seeks to recover from the Live Stock National Bank of Omaha the sum of $15,000, being the amount of funds of the said construction company which Elmer G. Risk, its president, transferred to said bank in payment of his personal notes. Both sides moving for a directed verdict, the trial court dismissed the jury, and rendered judgment for the defendant bank, from which the trustee appeals.

Plaintiff trustee filed a petition in the district court for Douglas county on February 26, 1938, alleging that the Central Bridge & Construction Company, a Nebraska corporation, was adjudicated a bankrupt on March 9, 1937, in the United States district court for the district of Nebraska, Lincoln division; that on April 16, 1937, the plaintiff, Barton H. Kuhns, was duly elected and qualified as trustee of said bankrupt estate; that on the date of the adjudication in bankruptcy of the Central Bridge & Construction Company, Elmer G. Risk was, and for many years had been, president and a member of the board of directors of said corporation, and M. E. Carman had been secretary and a member of the board of directors.

Plaintiff further alleged that on January 12, 1937, the Central Bridge & Construction Company deposited with the defendant bank $19,215.39 of its own funds, which defendant bank placed to the credit of the Central Bridge & Construction Company in its open checking account; that the next day, January 13, 1937, Elmer G. Risk and M. E. Carman did wrongfully and unlawfully, and without the authority of the Central Bridge & Construction Company or its board of directors, withdraw and divert from the corpo-

rate funds so deposited the sum of $15,000, which on said day the said Elmer G. Risk turned over to the defendant bank in payment of a personal debt which he owed the said bank, which debt had not yet become due.

Plaintiff further alleged that the bank, knowing said funds to be the property of said corporation and said debt to be the personal debt of said Risk, participated in and benefited by said wrongful and unlawful diversion of corporate funds by receiving the same in payment of Risk's personal debt to the bank, this diversion of funds being made by means of a check dated January 12, 1937, and signed by M. E. Carman, secretary of the Central Bridge & Construction Company, upon its checking account in said bank for the sum of $15,000, payable to the order of E. G. Risk, and by him indorsed to the order of the Live Stock National Bank, which received said check and retained the proceeds thereof out of said corporate funds of the Central Bridge & Construction Company.

It is further alleged in said petition that said diversion and misappropriation of corporate funds was in fraud of the rights of the then existing creditors of the Central Bridge & Construction Company, the said company being insolvent at that time and owing debts which exceeded the value of its assets by more than $100,000; that plaintiff trustee has demanded payment of said sum, of which the bankrupt and its estate were so unlawfully deprived, and said payment was refused, and no part of said sum has been paid, for which reason the plaintiff trustee asks judgment against the defendant bank in the sum of $15,000 with interest at 6 per cent. from January 13, 1937.

The defendant bank filed its amended answer on January 18, 1939, admitting that the Central Bridge & Construction Company was adjudged bankrupt, and that the plaintiff is trustee of its estate; that Elmer G. Risk was president and M. E. Carman secretary of said corporation, and that it deposited $19,215.39 of its own funds in said bank on January 12, 1937.

For further answer, said defendant bank alleges that the

Central Bridge & Construction Company, located at Wahoo, Nebraska, opened a checking account in said bank on July 28, 1932, its signature card authorizing checks on its corporate funds to be drawn on the signatures of the following officers: E. G. Risk, president, W. G. Johnson, vice-president, and M. E. Carman, secretary; that on January 8, 1935, the board of directors of said depositor corporation adopted a resolution, which is set out in full as exhibit A, attached to the amended answer, which duly authorized the three officers of said corporation hereinbefore named, or either of them, to borrow money and execute promissory notes of said corporation and pledge its personal property as security for the payment of said notes, to discount bills of exchange, sign and deliver checks and drafts of the corporation upon said bank, and, quoting from the last paragraph of exhibit A, "said Live Stock National Bank is authorized to honor and pay checks or drafts so signed or drawn by them, or either of them, including drafts or checks to their own order, and said bank shall not be responsible or liable in any event for application of funds paid or withdrawn thereon."

Defendant further alleges that said signature cards and resolution, as set out herein, remained in full force and effect on and after January 12, 1937, when the check for $15,000, payable to the order of E. G. Risk, was drawn and signed by M. E. Carman, secretary, and said bank received the same by mail on January 13, 1937, indorsed on the back, "Pay to the order of Live Stock National Bank, E. G. Risk," inclosed in a letter written on the letterhead of the Central Bridge & Construction Company, of Wahoo, Nebraska, dated January 12, 1937, and, as set out in paragraph 4 of the answer, reading as follows:

"Central Bridge & Construction Co.
Wahoo, Nebraska
January 12, 1937

Live Stock National Bank,
Omaha, Nebraska.

Attention: Alvin E. Johnson, Pres.
Gentlemen:

I am herewith enclosing check for $15,000.00 in payment of my two notes of $7,500.00 each.

You may credit the unearned discount to my account.

Very truly yours,

Elmer G. Risk"

Said bank further alleges that it was without knowledge or notice of any fact or circumstance with respect to the financial arrangements or obligation between the depositor corporation and E. G. Risk, or anything from which to deduce, know, or surmise that Risk was not entitled to the amount of said check from said corporation, and said bank was bound by its contract to act as it did with regard to said check and the proceeds thereof; that said bank mailed its monthly statement to the Central Bridge & Construction Company at its office in Wahoo, Nebraska, on February 1, 1937, which account showed a balance of $4,433.96 after payment of the check of $15,000 on January 13, 1937, and that at no time thereafter did the corporation, or any of its officers or agents, protest the payment of said check of $15,000, and therefore the plaintiff, as its trustee in bankruptcy, is estopped to claim that said $15,000 check was not a proper and authorized debit against said corporation's checking account, as defendant bank had no notice that said depositor corporation was insolvent, or in financial difficulty, or of anything relating to its internal affairs at the time said check was presented for payment and charged against the account, nor at any time until after bankruptcy proceedings were instituted, and therefore the defendant bank prays that the petition be dismissed.

To this amended answer plaintiff trustee filed a reply, admitting that the signature cards and resolutions were duly signed as set out in exhibit A, attached to the amended answer, and alleges that the resolutions were in language prepared and selected by the defendant bank, and denies that there was any contract between the defendant bank

and the construction company for the use by Risk, or by the defendant bank, of the corporate funds in payment of Risk's personal debts to the defendant bank.

It is further denied in said reply that the defendant bank suffered any damage or detriment by reason of any failure of the bankrupt to complain or protest the payment of the $15,000 check. Plaintiff alleges that the bank made no inquiry from any responsible source as to Risk's authority to use said check in payment of his personal debt to said bank, and if it had made inquiry it would have received the information that Risk had no authority to make such use of corporate funds, and alleges that on February 2, 1937, the affairs of the construction company were turned over to a bonding company which had become a surety for said construction company in its construction business in a sum in excess of $100,000; that both the corporation and Elmer G. Risk were grossly insolvent on January 12 and 13, 1937, and at all times thereafter, and denies the other allegations contained in said amended answer.

On February 6, 1939, said cause came on for trial before a jury, and at the conclusion of the plaintiff's evidence a motion was made by the defendant bank that the court direct the jury to return a verdict in its favor, and on February 8, 1939, the said jury was discharged, and after arguments of counsel the case was taken under advisement by the court.

On February 21, 1939, plaintiff trustee filed a request that the court state in writing the conclusions of fact found separately from the conclusions of law, and on March 11, 1939, a request was filed that the court make special findings of fact, to wit: (1) That the court find that the Central Bridge & Construction Company and Elmer G. Risk were insolvent on January 12 and 13, 1937; (2) that Elmer G. Risk's financial condition was such that on January 12 and 13, 1937, and at all times thereafter, his two notes for $7,500 each to the defendant bank were worthless and uncollectible; (3) that Central Bridge & Construction Company had no authority under its articles of incorporation to

apply any of its funds to the payment of the personal debts of Elmer G. Risk; (4) that neither Central Bridge & Construction Company nor its trustee in bankruptcy received any consideration for the $15,000 check.

On March 11, 1939, request of plaintiff was denied, and a motion for judgment for plaintiff on the pleadings was also denied.

On March 13, 1939, an order and judgment was entered, finding that the allegations of fact of the defendant's amended answer have each and all been established by the evidence, and plaintiff is precluded from relief prayed for in his petition, and that defendant is entitled to a dismissal of the action. Among the findings of fact in said judgment is one finding that E. G. Risk borrowed $7,500 from the defendant bank on December 24, 1936, and on December 31, 1936, borrowed $7,500 more, for which he gave his promissory notes to the defendant bank, and that he placed the sum so borrowed to his personal credit in his deposit and checking account in said bank; that the first of said notes was payable January 23, 1937, and the last of said notes was payable January 30, 1937, and that the two notes were paid off January 13, 1937. The court found that the construction company deposited a check of $19,215.39, drawn to its order by Wachob, Bender & Company on January 12, 1937, and that prior to the deposit of said check the balance in the account stood at $218.57.

The court further finds that the Central Bridge & Construction Company was adjudicated bankrupt on March 9, 1937, and E. G. Risk was adjudicated bankrupt on June 22, 1937, and that no part of the $15,000 represented by said check was repaid to the corporation, or to the plaintiff as its trustee in bankruptcy.

The court further finds that, in dealing with said $15,000 check and the application thereof, the defendant bank relied upon the resolution of the board of directors of said corporation, and made no further inquiry as to its authority, or the right of Risk to so apply the same to his own debts.

The court further finds that plaintiff's request to make

special findings of fact, to the effect that on January 12 and 13, 1937, E. G. Risk had withdrawn more than $80,000, not including the $15,000 check of the funds of the corporation in excess of all credits to which he was entitled, without the knowledge or consent of the directors other than M. E. Carman, and that the other directors of said corporation did not know that Risk and Carman were withdrawing corporate funds for Risk's personal purposes, and did not know of the payment of his notes to the defendant bank by means of the $15,000 check until shortly before the corporation's bankruptcy, should be denied because the evidence upon which said requested findings would be made by the trial court was all based upon evidence objected to by the defendant bank as immaterial and without foundation.

It was therefore ordered by the court that, as the plaintiff had failed to establish a cause of action, and because the defendant bank was fully authorized to charge said $15,000 check to the account of the corporation and apply the proceeds thereof in payment of the personal notes of Risk, as directed by him, the defendant is entitled to a judgment, and the petition of the plaintiff trustee is dismissed.

On March 25, 1939, the motion for a new trial, setting out 26 errors of the court, was overruled, and the plaintiff thereupon appealed.

The principal contention in this case is, whether the all-inclusive resolution, a paragraph of which is set out herein, relieved the bank of all liability in applying a corporation check in payment of its two notes for money loaned to the president of the corporation.

"One accepting corporate checks drawn by an officer in payment of his private obligations must return the proceeds if corporate funds were thereby misapplied." *McCullam v. Buckingham Hotel Co.*, 199 S. W. 417 (198 Mo. App. 107). In the decision it was said: "A bankruptcy trustee may recover corporate funds diverted by an officer for paying his private debts while the corporation was in-

solvent, although many creditors' claims represented by the trustee accrued subsequent to such diversion."

In *Boyle v. Lewiston Trust Co.*, 136 Atl. 292 (126 Me. 74), it was said: "A trustee in bankruptcy represents the creditors and hence is not estopped from recovering corporate funds used to pay an officer's personal obligations, even though the directors or stockholders consented to such payment." This is because the trustee represents the creditors of the corporation and they are not estopped because the directors acquiesced in or consented to such payments.

"Banks, being bound to take notice that county treasurer had no power to borrow money for county or school board thereof, became liable to subrogated surety on treasurer's bond for money loaned by them to treasurer individually, deposited in his accounts as treasurer and later repaid by checks on such accounts, as against contention that loans were to county for county and school board purposes and properly payable out of county funds." *Bank of Giles County v. Fidelity & Deposit Co.*, 84 Fed. (2d) 321.

One of the early cases in Nebraska is that of *Mendel v. Boyd*, 3 Neb. (Unof.) 473, 91 N. W. 860. It was an opinion by Commissioner Barnes, concurred in by Commissioners Oldham and Pound. J. C. Watts, cashier of State Bank of Neola, Iowa, speculated with the funds of the bank until he had used the bank's money to the amount of over $46,000. The plaintiff, Mendel, was one of the bondsmen of Watts, and having paid the losses of the bank was subrogated to the rights of the bank, and brought suit against Boyd on the amount of 19 drafts drawn to the order of Watts, and indorsed by Watts to Boyd for payment of transactions, commonly known as "bucket shop" or board of trade deals, through James E. Boyd, of Omaha. In the trial court a verdict was returned for the defendant, which was reversed and remanded in this court, and it was held: "The broker in such transactions will be held liable to the true owner of the funds, even if he has no knowledge of the ownership thereof." On the second appearance of *Mendel v. Boyd* before this court, 71 Neb. 657, 99 N. W. 493, it was held

that, when it appears that a cashier of a bank has issued drafts to himself for his own private purposes, there is no presumption that they were paid for when issued, and the burden is on the party claiming they were thus paid for to prove it.

The appellee bank in its reply brief says it "does not contend that if it had actual knowledge that this check had been drawn by or on behalf of Risk in order for him to individually use corporate funds and not for proper corporate purposes, appellee could avoid liability merely because Risk himself had not executed the check for the corporation. Appellee merely contends that in regard to this check, first, there was some transaction between the corporation and Risk, and that appellee was not required to inquire into that because of the corporate resolution authorizing and directing the bank to honor checks payable to an officer of that corporation, regardless of how they were applied. The check having validly got into the hands of Risk, it operated as an assignment of the corporate funds held by the bank for the corporation. Thereafter the bank stood on the same footing as any other third party who might have purchased this check from Risk." Again, the bank in its reply brief says: "Not being required to look into how or why this was done, the bank then, like any other innocent third party, could buy this check."

These contentions of the bank imply that the bank contends that it was a holder in due course, but remember, the bank was the drawee, and when it pays a check drawn upon it, then it cannot be a holder in due course.

"The payment of a check by the drawee bank is not a negotiation and does not make the bank a holder within sec. 30. The check is extinguished and cannot be put in circulation again so as to bind the drawer or indorsers. *American Hominy Co. v. Millikin Nat. Bank*, 273 Fed. 550 (Ill.); *Aurora State Bank v. Hayes-Eames Elevator Co.*, 88 Neb. 187, 129 N. W. 279; *National Bank of Commerce v. Farmers & Merchants Bank*, 87 Neb. 841, 843, 128 N. W. 522; *Gerlach v. North Texas & S. F. Ry. Co.* (Tex. Civ. App.)

244 S. W. 662." Brannan, Negotiable Instruments (6th ed.) 465, sec. 30.

This same question has been before this court in the case of *National Bank of Commerce v. Farmers & Merchants Bank*, 87 Neb. 841, 128 N. W. 522, in which section 30 of the negotiable instruments law is discussed. The question of what is meant by negotiating an instrument is explained: "If A gives B a check on C bank, and B presents the check at the counter of C, no negotiation is necessary or had; he simply demands and receives payment; but, if B goes to D store and buys a bill of goods and tenders the indorsed check in payment, he negotiates the check. The difference is clear and well defined. The presentation by defendant of the check in controversy, *for payment*, was not a 'negotiation' of the check within the meaning of the statute quoted."

"If a depositor seeks to pay his own debt to a bank by appropriation of funds to his credit in fiduciary capacity, the bank acting as depositary of the trust funds is charged with knowledge of the character of the appropriation and will be compelled to refund, as the bank, in honoring checks payable to itself out of the trust account, participates in * * * committing a breach of trust." *People v. State Bank of Herrick*, 290 Ill. App. 130, 8 N. E. (2d) 71.

"But even if the bank had known that the fund covered by the check constituted a trust in the hands of Mrs. Dunlop, it would not be liable to the owners of the fund merely because it allowed her to deposit the check to her personal account and honored checks drawn against that account, unless it either acquired an advantage or benefit as a result of the diversion of the trust fund or joined in the diversion with actual knowledge that such diversion was intended or was being executed, and thereby become privy to it." *Bank of Vass v. Arkenburgh* (1932) 55 Fed. (2d) 130.

Bliss v. Live Stock Nat. Bank, 122 Neb. 668, 241 N. W. 106, is mentioned and referred to in both briefs. The receiver of the First State Bank of Bethany brought an action against its president and vice-president and the Live Stock National Bank of Omaha, Nebraska, for conversion

of the funds of the bank. There was an impairment of the bank's capital to the amount of $4,000, and this amount was borrowed on a note signed by the president and vice-president of the bank as individuals, and the proceeds of the note passed to the credit of the First State Bank of Bethany. A payment of $500 was made, and later the vice-president directed that the note be charged against the account of the First State Bank in the Live Stock National Bank, and the note so paid was returned to the bank. It was held that the Live Stock National Bank, having received payment of the individual note of the president and vice-president of the First State Bank unauthorized from funds of the bank, with knowledge, is liable for the conversion of the amount so paid, and it was held:

"Where the president and vice-president of a bank make an unauthorized payment of their individual debts out of funds of the bank, the bank may recover from the creditor who received the payment with knowledge that it was so paid.

"The fact that the president and vice-president are personally interested in a transaction is sufficient to put the creditor on inquiry as to their authority to pay their individual debts with funds of the bank."

On the second appeal of this case, in 124 Neb. 880, 248 N. W. 645, the holdings were made even more clear.

In a case in which a certificate was signed by the vice-president and secretary of a corporation, reciting adoption of resolution authorizing defendant bank to honor instruments signed by those named therein *without inquiry*, even if drawn to individual order of signing officer, or tendered in payment of individual obligation, it was "*held* not, as a matter of law, to relieve bank from liability for paying corporation's check, drawn by director to himself as payee, where it had knowledge or was charged with notice of director's conversion of proceeds, particularly where certificate was false. In corporation's action against bank, which paid corporation's check, drawn by director to himself as payee, proceeds of which were converted by him, evidence

that bank was put on inquiry by suspicious circumstances *held* to present question of fact for determination of the jury." *Susquehanna Line v. Auditore,* 229 N. Y. Supp. 181 (223 App. Div. 585). In the opinion it is added: "To carry this respondent's argument to its logical conclusion, such a resolution as therein certified justified the bank and relieved it from liability, if it had gone to the extreme extent of participating in a conversion of the plaintiff's funds."

There is merit in the contention that banks are essential factors of modern business life, and their transactions cannot be clogged, or pace slackened, especially in cities, by unwarranted restrictions. However, in the case at bar there was a loss of $15,000 to an insolvent corporation by the wrongful act of its president in paying his private debt to the bank with the funds of the corporation.

The resolution, doubtless furnished by the bank, and adopted by the board of directors of the corporation, was designed to, and would, protect the bank in each and all of the transactions between the corporation and the bank, with perhaps a single exception. In a clear case, such as this, of loss to the corporation and benefit to the bank in the payment in full of its own notes, which were signed by the president of the corporation in his individual capacity, in our opinion the resolution was insufficient to protect the bank. The resolution authorized the bank to pay checks drawn to the order of certain officers of the corporation, including the president. But when the president of the bank received that letter inclosing a corporation check, being used by the president of the corporation to pay his private notes to that bank, it would be perfectly clear that money was being taken out of the corporation's deposit for personal use. We find nothing in the resolution which authorizes this to be done.

We have reached the conclusion, after a careful examination of the authorities cited and many others, that in such a case there was placed upon that bank the duty of inquiry, but the bank made none. If the bank had made inquiry, it would have learned that the president had no authority to

use the corporate funds for payment of his own debts. The bank's position is the same as if it had actual knowledge of such lack of authority, because it is charged with knowledge of the facts which the inquiry would have developed when it receives the entire benefit of the transaction. *W. L. Chase & Co. v. Norfolk Nat. Bank of Commerce & Trusts*, 151 Va. 1040, 145 S. E. 725; *Union Stock Yards Nat. Bank v. Campbell*, 2 Neb. (Unof.) 72, 96 N. W. 608; *Cady v. South Omaha Nat. Bank*, 46 Neb. 756, 65 N. W. 906; *Allen Dudley & Co. v. First Nat. Bank*, 122 Neb. 443, 240 N. W. 522; *Hinds & Lint Grain Co. v. Farmers Elevator Co.*, 99 Neb. 502, 156 N. W. 1045; *People v. Peoples Loan & Trust Co.*, 285 Ill. App. 552, 2 N. E. (2d) 763; *State v. Farmers State Bank of Hadar*, 111 Neb. 585, 197 N. W. 386; *Roe v. Lahaye* (C. C. A. 8) 64 Fed. (2d) 962; *Fehr v. Campbell*, 288 Pa. St. 549, 137 Atl. 113; *Federal Mortgage Co. v. Simes*, 210 Wis. 139, 245 N. W. 169; *Bordy v. Goodman-Buckley Trust Co.*, 131 Neb. 342, 268 N. W. 286; *Fisher v. National Mtg. Loan Co.*, 132 Neb. 185, 271 N. W. 433.

In our opinion, the burden was upon the defendant to show that the president of the corporation had authority to use corporate funds to pay his notes to the bank. This is so because, where the defendant bank gets the money, no notice or knowledge need be shown other than this: The bank's knowledge that corporate funds were being transferred in payment of the officer's debt. The fact of the officer's personal interest in the transaction puts the bank on inquiry and charges it with notice.

The judgment of the trial court, finding that the plaintiff had failed to establish a cause of action and dismissing plaintiff's petition, is hereby reversed, and the cause is remanded for further proceedings.

REVERSED.

MARY RUZICKA V. STATE OF NEBRASKA.
289 N. W. 852

FILED JANUARY 26, 1940. No. 30579.

1. **Criminal Law.** A conviction may rest on the uncorroborated evidence of an accomplice when, considered with all the testimony and circumstances, it satisfies the jury beyond a reasonable doubt of the guilt of the accused.
2. ———. A conviction based upon the evidence of an accomplice is insufficient to support a verdict of guilty where it appears that such witness has wilfully sworn falsely in regard to material matters, or otherwise shown that his evidence is unreliable, unless such evidence be corroborated.

ERROR to the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Reversed.*

Guy A. Hamilton and *Stanley Bartos*, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Rush C. Clarke, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

CARTER, J.

The plaintiff in error, Mary Ruzicka, was convicted in the district court for Fillmore county of stealing $2,711 in money from Mike and Jennie Kubicek, and was sentenced to serve three to five years in the reformatory for women. From this conviction and sentence the defendant below prosecutes error and presents to this court a record of her conviction for review.

The record shows that on August 16, 1938, Dorothy LeGrand, an Assyrian woman professing to be a fortune teller and Indian healer, went to the home of Mike and Jennie Kubicek near Milligan, Nebraska, and offered to effect a cure for Mike Kubicek, who was then suffering from a cancer of the throat. As a means of ingratiating herself into the confidence of the Kubiceks, she produced a note purporting to have been signed by the defendant, a

cousin of Mike Kubicek, which stated in substance that Dorothy LeGrand had cured her of gall stones, that she would cure him also if he would follow her instructions and believe in her, and that she was honest. The result was that Dorothy LeGrand started in that afternoon to cure Mike Kubicek of his affliction.

The method employed called for the use of money, a bowl of water, broomstraws and charcoal, which, when accompanied by the prayers of Dorothy LeGrand, was to result in a complete cure of Mike Kubicek. On the first day the sum of $6 was solemnly dipped in the water, blessed by Dorothy LeGrand and ceremoniously pinned on the breast of the patient. On subsequent days in which Dorothy LeGrand attended her patient, the amount of money was increased until the sum of $2,711 was being used; the amount of money used having been determined by the number of knots which Jennie Kubicek could tie in a strip of cloth provided by Dorothy LeGrand, the 27 knots so tied requiring the use of $100 for each knot. The result was that the money was abstracted and these trusting complainants bilked out of the whole $2,711. Law enforcement officers found Dorothy LeGrand in Spokane, Washington, with a newly purchased automobile and a small amount of money in her possession. She was returned to Fillmore county, where she entered her plea of guilty to the crime.

The record further shows that Mary Ruzicka, the defendant, was the wife of Frank Ruzicka, a farmer living near Dorchester, Nebraska. She was fifty-nine years of age at the time Mike and Jennie Kubicek were defrauded of their money. It appears that defendant believed she was endowed with certain faith-healing powers as was evidenced by a certificate issued to her by the State Spiritualists Association of Nebraska, declaring her to be a recognized faith healer. On August 13, 1938, defendant, while attending a picnic at Milligan, Nebraska, went to a concession booth operated by Dorothy LeGrand, and had her fortune told. She was told that she was suffering from gall stones, which in reality was a fact. The ensuing conversation re-

sulted in Dorothy LeGrand agreeing to call upon defendant at her home to cure her of her affliction. Later in the day, defendant took her aged aunt, Josie Novatny, to Dorothy LeGrand to have her fortune told. The interview resulted in a pronouncement that the aunt was suffering from kidney trouble, and also a declaration by Dorothy LeGrand that she could cure her with one treatment. The evidence also shows that defendant later met Jennie Kubicek at the picnic and informed her of her faith in the powers of Dorothy LeGrand and of her belief that Mike Kubicek might be helped by her treatments.

Pursuant to her arrangement with defendant, Dorothy LeGrand called at her home on August 16, 1938, and gave the first treatment. Defendant did not have the required fee of $2, and defendant's husband drove a team and wagon to the home of his daughter and her husband, one-half mile distant, to obtain it. During his absence Dorothy LeGrand insisted that she had to have three or four other articles to hang in her church to effect a cure. By this means she obtained a dresser scarf, a bed spread and a dress which were to be returned after the last treatment. They, of course, were never returned. Defendant then testifies that Dorothy LeGrand inquired about any persons in the neighborhood who were suffering with cancer. The names of Mike Kubicek and a Mrs. Halverson were given to her. Upon request, defendant wrote a note, introductory in character, to each of the two named persons. The written notes were not produced at the trial, and there is much conflicting secondary evidence as to their exact contents. An examination of all the evidence regarding the contents of the notes convinces us that they recited that Dorothy LeGrand had given defendant a treatment for her gall stones, that she had been helped thereby, and that the addressees of the notes should give her a trial. Other claimed differences in the notes are not material to a disposition of the case, although there is substantial evidence that a substituted note was delivered to the Kubiceks. Defendant testifies that Dorothy LeGrand came back on August 19, 1938,

and gave her a second treatment consisting of the use of the Bible and a prayer, accompanied by a rubbing near the afflicted area. Demands were made for other household articles which were refused and, according to defendant, resulted in some ill feeling and distrust. It is the contention of defendant that she never again saw Dorothy LeGrand until she saw her in jail in Geneva, where she was being held for stealing the money of the Kubiceks. Defendant denies that she had anything to do with the larceny, claims she never saw Dorothy LeGrand during the period the fraud was being perpetrated, and positively denies that she ever received any part of the money. It is not contended that any of the stolen currency was found in the possession of the defendant.

The state bases its case almost entirely upon the evidence of Dorothy LeGrand, who, upon her arrest, implicated the defendant as an accessory. The story told by Dorothy LeGrand was substantially as follows: She had spent most of her life traveling over the United States with carnival companies. She had been married three times and was in the habit of using aliases including the names of her former husbands. During the times herein mentioned she was using the name of Mary Starr. There is little dispute in the evidence as to the transactions and conversations between defendant and Dorothy LeGrand at the Milligan picnic. The evidence of Dorothy LeGrand is that the first time she called on defendant at her home, and while defendant's husband was driving over to his daughter's house to borrow $2 to pay her, defendant conspired with her to defraud the Kubiceks. The testimony of Dorothy LeGrand is that she was not a faith healer and knew nothing of the art, that all she knew about it she learned from defendant during the half hour Frank Ruzicka was away, and that defendant instructed her in the use of the bowl of water, broomstraws, charcoal, and the Bible, and taught her to pray in order to gain the complete confidence of her victims. She testifies that defendant instructed her concerning the whole method of procedure and demanded that she

be given half of the ill-gotten gain as her share. Her evidence also is that on her second call on defendant on August 19, 1938, she informed defendant that she was about to take the money and that she would meet her at the crossroads a half mile from the Ruzicka home on the following Friday night, August 26, 1938, at 8 p. m., to divide the $2,700. She testifies that she did meet defendant near the designated crossroads as agreed and delivered $1,300 in currency to her, and that she thereupon took flight to avoid the punishment she so justly deserved.

The positive evidence of Frank Ruzicka, Leona Peterson and Paul Peterson, defendant's husband, daughter and son-in-law, respectively, is to the effect that on the evening of August 26, 1938, from 5 p. m. until the next morning, the defendant was at and near the family home and did not and had no opportunity to meet Dorothy LeGrand at the crossroads as she testified. The defendant also produced the evidence of five reputable residents of the Dorchester community who had known the defendant for many years, who testified that her general reputation as a law-abiding citizen was good. No evidence to the contrary was produced.

The sheriff of Fillmore county testified, among other things, that at the time of the arrest of the defendant, her husband said: "How much money will it take to settle this so she won't have to go to Geneva?" The contention is advanced that this was evidence of guilt. We think the husband satisfactorily explained the statement when he said he was inquiring about giving a bail bond. But in any event the statement of the husband could not be used as an admission of guilt against this defendant. The statement was not admissible for any purpose.

The defendant complains of many alleged errors. Under our view, the case can be decided on the question of the sufficiency of the evidence to sustain the conviction and it will not be necessary to discuss other features of the case.

Under the law of this state, an accessory before the fact of a felony is equally guilty with the principal. Comp. St. 1929, sec. 28-201. The guilt of the principal in this case,

Dorothy LeGrand, is conclusively established by the evidence. Also, it is the settled law of this state that a conviction may rest upon the uncorroborated evidence of an accomplice when sufficient in connection with the other evidence to satisfy the jury beyond a reasonable doubt of the guilt of the accused. *Lamb v. State,* 40 Neb. 312, 58 N. W. 963; *Barnes v. State,* 124 Neb. 826, 248 N. W. 381; *Lovejoy v. State,* 130 Neb. 154, 264 N. W. 417. Likewise, it is ordinarily for the jury to determine the credibility of the accomplice and the weight to be given to his testimony. But even so, the evidence must be sufficient to sustain a finding of guilt beyond a reasonable doubt as a matter of law before the verdict of a jury will be permitted to stand. We think a reasonable doubt was created as a matter of law, which precludes a verdict of guilty under the evidence produced. It will be our purpose in the remainder of this opinion to point out the evidence which creates a reasonable doubt as a matter of law.

The evidence is clear that Dorothy LeGrand was an Assyrian woman whose occupation was fortune telling and Indian faith healing, a person usually spoken of as a Gypsy and having the vagabond habits and traditional occupation of the Gypsy peoples. She denies that she was a healer of any kind and claims that the defendant taught her all she knew about it in a thirty-minute interval in the absence of defendant's husband. That this statement is absolutely false is borne out by her own testimony. The very first time Dorothy LeGrand interviewed the defendant she told her she had gall stones and agreed to come to defendant's home to treat her. She came to the home and, according to her own evidence, administered a treatment and insisted upon and obtained pay therefor before any conversation was had about bilking the Kubiceks. Her admitted inquiries about prospective cancer patients, and her claims that she could cure them, likewise belie her testimony that she was not a faith healer.

The use of the broomstraws, charcoal, bowl of water and other articles employed in healing Mike Kubicek was not

the work of a beginner. The finesse with which Dorothy LeGrand induced the Kubiceks to increase the amounts of money used from $6 to $11 to $111 to $1,411 and finally to $2,711 was not learned in a thirty-minute session with a simple Czech farm woman. The credulity of this court is such that we cannot accept the statement of Dorothy LeGrand to that effect as true when considered in the light of the evidence and circumstances surrounding this case.

It is the testimony of Dorothy LeGrand that she called on defendant the second time on August 19, 1938. At that time she says that she told Mary Ruzicka that she would have $2,700 to divide with her on August 26, 1938, and that she made an appointment to meet Mary Ruzicka at the crossroads near her home at 8 p. m. of said day. In the first place, Dorothy LeGrand, at the time of this conversation, had induced the Kubiceks to put up the sum of $11 only, and she positively had no way of knowing how much she would be able to take. The knot-tying episode did not take place until later, and unless this court is going to concede that Dorothy LeGrand could divine the future, we must necessarily take the view that she deliberately falsified when she made this statement. Her testimony that she did meet the defendant at the crossroads at the designated hour and gave her $1,300 appears very unreliable. In the first place she says she came to the crossroads in a car driven by one Bob Stanley, met Mary Ruzicka where it was light and where she was plainly seen. The evidence of Stanley is that he parked his car while Dorothy LeGrand got out and walked down the road in total darkness and that he at no time saw Mary Ruzicka. The evidence of the husband, daughter and son-in-law of the defendant is that Mary Ruzicka never left their company on the night of August 26, 1938, at the time claimed by Dorothy LeGrand, and that she had no opportunity to do so. It might be expected that these witnesses, being interested, might color their testimony to aid Mary Ruzicka, but it does not appear probable, nor can it be presumed, that they would commit a deliberate perjury and fabricate a story which was much

more plausible than that told by Dorothy LeGrand herself. The evidence shows that Dorothy LeGrand had previously arranged for her traveling companions to depart for the west earlier in the day, with the understanding that she and Stanley would overtake them along the road. With preparations made for flight immediately after the stealing of Kubiceks' money, it requires an elastic imagination to believe that Dorothy LeGrand was so honest and reliable that she would drive out of her way to give $1,300 to this defendant. Certainly, the pursuit would be just as determined, whether she divided the spoils with Mary Ruzicka, or not. It is also noticeable that at the time of the trial of this defendant, Dorothy LeGrand, although she had entered her plea of guilty and had long before confessed her guilt, had not been sentenced. It is not difficult to believe that the fantastic tale unfolded by her was prompted somewhat by the hope of immunity from punishment. All of these evidences of the unreliability of Dorothy LeGrand as a witness, and the established good reputation of this defendant generally as a law-abiding citizen, establish as a matter of law, we think, that there is a reasonable doubt of the guilt of this defendant.

The evidence as a whole shows that Dorothy LeGrand was an admitted felon, a cheat and a fraud. She apparently has no respect whatsoever for truth. The contradictions in her own testimony are sufficient to show her unreliability as a witness. If the discredited testimony of so unreliable a witness is sufficient without corroboration to send a reputable person to prison, then our rule requiring proof of guilt beyond a reasonable doubt becomes a meaningless phrase and a mockery.

The state takes the view that a jury question was presented and that any attempt on the part of this court to arrive at a different conclusion would amount to a usurpation of the duties of the jury. We, of course, take the view that the evidence is insufficient to sustain a conviction as a matter of law, and that we are therefore obliged to direct a reversal of the case. We think, also, that our position is

supported by a decision of this court which is very much in point. In *Jahnke v. State,* 68 Neb. 182, 104 N. W. 154, we said: "The evidence of an accomplice should be closely scrutinized. If it appears that such witness has wilfully sworn falsely in regard to a material matter upon the trial, his evidence cannot be sufficient, if uncorroborated, to support a verdict of guilty."

In *Sykes v. United States,* 204 Fed. 909 (8 C. C. A.), the court disposed of a very similar case in the following language: "It is only when the evidence is sufficient to convince of the guilt of the accused beyond a reasonable doubt that one may lawfully be convicted of a crime. 'It is undoubtedly the better practice,' says the supreme court, 'for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them.' *Holmgren v. United States,* 217 U. S. 509, 523, 524, 30 Sup. Ct. 588, 592 (54 L. Ed. 861, 19 Ann. Cas. 778). And the conclusion is that the uncorroborated testimony of the confessed perpetrator of a crime, contradicted under oath by herself, contradicted by other witnesses, and inspired by the hope of immunity from punishment, which in this case has since turned to glad fruition, that another was an instigator or a participator in the perpetration of her crime, is not only insufficient to establish his guilt beyond a reasonable doubt, but that it presents no substantial evidence of it. *Jahnke v. State,* 68 Neb. 154, 94 N. W. 158."

A consideration of all the evidence adduced at the trial and the circumstances surrounding the commission of the alleged crime requires us to hold that the state has failed to produce evidence sufficient to sustain a finding of guilt beyond a reasonable doubt.

REVERSED.

PAINE, J., dissenting.

I respectfully dissent from the opinion finally adopted by this court. The case was first argued to the court on September 21, and ordered reargued on November 20, 1939. The reversal of conviction is based on the question of the

sufficiency of the evidence to sustain the verdict of guilty returned by the jury.

The defendant denied her guilt, but the only conclusion to be drawn from the verdict is that the jury did not believe the story she told on the witness-stand.

What were the facts, as shown by the evidence, which the jury did believe?

Dorothy LeGrand testified that she was 60 years of age, born in Cincinnati, Ohio, and was an Assyrian. She had a concession at the Milligan street picnic in August, 1938, and gave advice and mind readings in a trailer. She testified that she charged her customers what they could pay; that some paid 15 cents, some 25 cents, some 50 cents, and some a dollar; that she had been making her headquarters with Robert Stanley and family at Bradshaw; that the car and trailer that she used belonged to Mr. Stanley, who drove her in it.

She testified that the defendant came in to have her fortune told on Saturday, and in making the reading she told the defendant she had gall stones. Defendant asked whether she could cure them, and Mrs. LeGrand replied that she did not know. Defendant then invited her to come over to defendant's home and pray for her. Therefore, on the following Tuesday Robert Stanley drove her in his Chevrolet to Mrs. Ruzicka's, but the roads were so muddy that they stopped at a house on the corner and sent word from there to the Ruzicka house, and the defendant's husband came for her in a farm wagon, and this was about noon.

While Mrs. LeGrand was treating her, the defendant sent her husband to the son-in-law's to get $2 to pay Mrs. LeGrand. While he was gone, a period of between half and three-quarters of an hour, the defendant told her to go and see Mike Kubicek, her cousin, who was sick with a cancer, and to heal him, and that the Kubiceks had plenty of money and plenty of property, and for her to get plenty, and "You will have to give me half." Then the defendant told her about a lady at McCool who had a cancer too, but not to take much money from her, for she was poor, and the de-

fendant at once, and voluntarily, wrote a note of introduction to both of these parties and gave them to her.

Mrs. LeGrand took these letters of introduction, but did not tell the defendant that she was illiterate and could not read nor write. She promised the defendant that she would give her half, regardless of what she got from Mike Kubicek, and the defendant's husband took her back to the car in his farm wagon, and she agreed to come back Friday and report what progress she had made.

Mrs. LeGrand went to the Kubiceks, arriving there in the afternoon of the same day. When she arrived the children were at home, but their parents had gone to see a doctor. She showed the children the note, and she told the children that the defendant had sent her there to heal their father. As soon as the Kubiceks returned, both of them read the note.

This very important letter of introduction written by the defendant, which instantly gained entrance into the home and heart of the sick man, was destroyed, but several people had read it, and the version which the jury doubtless accepted, from the several forms as recollected and testified to by witnesses, would read to this effect:

"Dear Cousin Mike.

"This lady cured me of gall stones and she will cure you too if you believe in her and do everything she tells you. She is honest."

Signed "Mary Ruzicka"

Mrs. LeGrand, having gained their confidence through the note of the defendant, wasted no time in starting operations, and told Mrs. Kubicek that if she wanted her husband cured she would have to live up to her request, and that was the use of numbers of money. They gave $6, and Mrs. LeGrand tied it up and pinned it on Mr. Kubicek, and the next time she called she asked for more money, and told them she could not help them without more money, and they added $5 to the $6 that was already pinned on his chest, but she told them he could not be healed without more money.

When she went back a fourth time they had $100, and that was wrapped up in a small package with the $11, and it was all pinned on Mr. Kubicek's chest, and she insisted on more money.

The widow Kubicek testified that, when Mrs. LeGrand demanded much more money to bring about a cure of her husband's cancer, although she went with him to the Geneva State Bank, and signed the note with him and borrowed the first $1,300, and took it home in a package fastened with rubber bands, yet she had become suspicious, and had her daughter Goldie and her son Mike take down a list of the letters and numbers on each bill, with the denomination of each piece of currency, and this list was introduced as state's exhibit No. 7, which gives the serial letters and numbers of the five 100-dollar bills and the forty 20-dollar bills, making the $1,300 brought from the Geneva State Bank, with the rubber bands around it.

Mrs. Kubicek testified that Mrs. LeGrand at the next "treatment" placed the $1,411 in the Bible, wrapped in a cloth, and had Mr. Kubicek sleep on it, and told them they must have more money, and she would come back on Friday, August 26.

Mrs. LeGrand's testimony in regard to the final amount is interesting. She was furnished a piece of cloth, and cut it off to a certain length, and she testified: "Q. How much more did you tell them? A. Thirteen hundred more. Q. That would make $2,711. How did you determine, decide on the amount of money? A. Well, I made her tie twenty-seven knots into a piece of cloth. Q. And each knot was to represent what? A. Hundred dollars." This piece of cloth, in which only 27 knots could possibly be tied, is in evidence as exhibit No. 3.

Several days before the "final treatment," Mrs. LeGrand drove to the defendant's home, where she was cooking dinner, and talked the matter over and told her that she was preparing to take the Kubicek money, and for her to meet her shortly after 8 o'clock Friday night, and told her how much money she would have with her, and the defendant

was willing to accept her share. She did not stay long, as the defendant told her to get out of the house before her husband came.

At the time of this "final treatment," Mrs. LeGrand waited until Mr. and Mrs. Kubicek came back from the bank, and then they all went in the house. The Kubiceks had just secured a second $1,300, which was in a canvas bag, and the five-, ten-, and twenty-dollar bills were loose in the sack. Mrs. LeGrand took them out and tied them up in a cloth with the other money, making a total of $2,711, putting them all together. The first package of $1,300 she put on the inside and the last money was rolled around it, and she tied it all up and put it in a new Bible, which she had required them to buy, and then tied the Bible in a tablecloth, and sent Mr. and Mrs. Kubicek to the river to say their prayers, and they took the Bible with them. When they returned from praying they all went in the dining-room, and Mrs. LeGrand ordered the children to go outside. Then she had Mr. and Mrs. Kubicek get down on their knees and pray, during which time Mrs. LeGrand abstracted the money from the Bible and replaced it with a package of newspapers, which she had already prepared before she came there, and tied it all up in the tablecloth, and instructed them not to open the package until 5 o'clock Monday afternoon. The Bible and the substituted package of newspapers were introduced in evidence. Mrs. LeGrand immediately left with the $2,711 in currency.

She told the Kubiceks when she left that she was going to see Mrs. Ruzicka, the defendant, and she went straight to the defendant's and stopped at the same place where she stopped on the muddy day at the farm corner, and she got out and met Mrs. Ruzicka, and it was after dark, and she gave her the $1,300 as her part, and the defendant said, "You better go on about your business before you are caught."

Mrs. LeGrand testified she had seen the defendant four times altogether, once at the picnic at Milligan, when she gave her a reading, twice at her house, and once on the road at night when she gave her the money.

The defendant's recollection of what she wrote in the letter of introduction to her cousin Mike, when Mrs. LeGrand made the first trip to her farm, differed slightly, but not materially, from the form set out hereinabove. She denied positively that she received the $1,300 from Mrs. LeGrand, and denied that she expected to get any money for writing the note to Mike Kubicek. She admitted that at the third time Mrs. LeGrand called on her, that is, on August 19, she asked whether the Kubiceks had money.

Sheriff Steinacher said he was called to the Kubicek home on Monday, August 29, about 7:30 a. m., when they discovered the bills were gone, and told of the robbery; that he drove at once to defendant's home, who told him at first that she did not know the lady she gave the note to, and claimed that she was forced to write it, but later withdrew such a claim.

The sheriff told how he traced the car through its Indiana license, and found that it was mortgaged, and the payment that was due August 30 was sent in from Post Falls, Idaho, by Stanley, and the sheriff sent wires out there and Mrs. LeGrand and Robert Stanley were arrested, and were in jail when he arrived at Spokane. Mrs. LeGrand finally confessed stealing the $2,700, and the sheriff testified that her confession was about as follows: "Well, she said that—that she made a number of trips to Mrs. Ruzicka's, and 'we planned that at Ruzicka's place while the husband was gone. She didn't want her husband to know anything about it, what was taking place.' As they planned it, she said that Mrs. Ruzicka told her to hit Kubiceks heavy because 'they have plenty of money, and if they can't—if they don't have the ready cash that they can borrow it, they have plenty of property,' that she wants to get hold of this money, that their place is covered with mortgage; she would like to buy a place of business where she could practice divine healing some place out of the state in a city."

The sheriff carefully examined the numbers on all of the bills they had in their possession at Spokane, and also on

$425 in bills they had just paid on a new trailer, and none of the currency examined bore any one of the numbers taken down by Goldie Kubicek from the first package of $1,300, and which Mrs. LeGrand testified were all in the package, still in rubber bands from the bank, when she handed the package to the defendant, Mary Ruzicka, the night before she left.

Paige Hall, county agent of Fillmore county, testified without objection that, after the courthouse offices were closed at 5 o'clock on the evening of September 12, he stepped out of his office and overheard a conversation between the defendant and her husband as they were going down the hall to the county attorney's office: "I heard Mrs. Ruzicka say, 'How did they get the numbers off from *this* money.' * * * He said, 'Goldie probably copied them off.'"

This is a brief summary of the evidence the jury considered in finding the defendant was guilty.

The information in this case charged in brief that the defendant, on or about August 26, 1938, in Fillmore county, did wilfully, intentionally, unlawfully, and feloniously, take, steal, and carry away $2,711, the property of Mike and Jennie Kubicek, against the will of the owners, and with the intent to defraud said owners of said property.

Section 28-201, Comp. St. 1929, reads as follows: "Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender."

In a Cherry county cattle-stealing case, John Scharman hired two boys to steal cattle from the Metzger ranch near Merriman and deliver them to his place near Nenzel. The boys, having been arrested, pleaded guilty and implicated Scharman, and he was charged as a principal in the same manner in which the defendant was charged in the case at bar. This court held: "That the same rule as to the information, conduct of the case, and punishment, heretofore applicable to a principal, should thereafter govern his aider, abettor, or procurer, and that no additional facts need be alleged in an information against such accessory before the

fact than are required against his principal." *Scharman v. State*, 115 Neb. 109, 211 N. W. 613.

Complaint is made as to the court's instructions on aiding and abetting, and the testimony of accomplices. In our opinion the court gave the approved form, for instruction No. 9 told the jury that Dorothy LeGrand and Robert Stanley are accomplices, and that, while the accused might be convicted upon the testimony of accomplices, yet the jury should act on such testimony with great care and caution.

Again, in instruction No. 11 the court very properly said: "Under the law of Nebraska it is not necessary for the state to prove beyond a reasonable doubt that the defendant actually received or obtained any of the money charged to have been stolen from the Kubiceks. If you find beyond a reasonable doubt that the defendant in this action aided another or procured another to steal the money of the Kubiceks, or to take the same away from them without their consent, and with the intention to defraud the said Kubiceks, or to take the same away from them without their consent, and with the intention to defraud the said Kubiceks of their said property, then the defendant would be, in the eyes of the law, equally guilty as the person who actually took and carried away the money, and it is your duty to so find."

The evidence given the jury was direct, and also circumstantial. "What is meant by circumstantial evidence, in criminal cases, is the proof of such facts or circumstances connected with or surrounding the commission of the crime charged as tend to show the guilt or innocence of the party charged; and if these facts and circumstances are sufficient to satisfy the jury of the guilt of the defendant beyond a reasonable doubt, then such evidence is sufficient to authorize the jury in finding a verdict of guilty." *Cunningham v. State*, 56 Neb. 691, 77 N. W. 60.

It is not necessary that each link in the evidence relied upon should be proved beyond a reasonable doubt. This court has held: "The testimony of one witness, if relevant

and accepted by the jury, may sustain a conviction of burglary, even though the accused positively denies under oath that he committed the offense." *Schultz v. State*, 88 Neb. 613, 130 N. W. 105.

In the brief of the attorney general appears the following summary:

"It is true that the story is both bizarre and fantastic. * * * Nobody but people like Mrs. LeGrand and Mrs. Ruzicka could think of schemes like that which was perpetrated on Kubiceks. It is true that Mrs. LeGrand was a liar and a thief, or she wouldn't have been engaged in the scheme at all. It is true that ordinarily such a person is not worthy of belief and that a conviction on such testimony alone would ordinarily not be obtained. But the question, of course, was not whether she is worthy of belief generally, but whether she told the truth in this case. All these questions as to her credibility were for the jury and not for this court, * * * the jury, of course, saw her on the witness-stand and observed her conduct and demeanor while testifying; saw the defendant and observed her; saw one of her witnesses perjure himself and then resume the stand to brand himself a liar, and decided that Mrs. Ruzicka did have a hand in this shocking theft.

"Mrs. Ruzicka knew that she had been told by Mrs. LeGrand that she lived near Lincoln, yet she withheld that fact from the sheriff when she knew he was looking for Mrs. LeGrand. She told the sheriff she had been forced to write the note to Kubiceks. There is evidence that she received $1,300 of the money. True, she says she didn't, but a witness, whom the jury apparently believed, says she did."

This very concise summary by the attorney general is supported by the evidence, and convincing in its conclusions. We must not forget that, while the defendant denied that Mrs. LeGrand handed her the package containing the $1,300, wrapped in rubber bands, as borrowed from the Geneva State Bank, yet the careful jury considered the fact that not one of the bills from that particular package,

of which all the numbers had been taken down, was ever found in the possession of Mrs. LeGrand, or the Stanleys, with whom she traveled to Spokane. The evidence is undisputed that the defendant told Mrs. LeGrand, who was an entire stranger in that community, that her cousin Mike had a cancer and had plenty of money, or could borrow it, and this valuable information, together with the seductive letter of introduction which the defendant voluntarily gave Mrs. LeGrand, furnished all the groundwork necessary for the successful larceny.

Now, having the evidence before us upon which the jury returned a verdict of guilty, what is the general principle of law governing the matter?

It is well stated in Corpus Juris, as follows: "It is the policy of the law that questions of fact shall be determined solely by the jury under the supervision of the trial court, and that the appellate court shall have nothing to do with the weight of the evidence on which a conviction is based." 17 C. J. 254.

This court has held: "In a criminal prosecution, the determination of the credibility of the witnesses and the weight of the evidence being peculiarly within the province of the jury, a verdict of guilty, based upon sufficient competent evidence, will not be disturbed, even though this court may entertain doubt as to the correctness of the jury's finding." *Burnett v. State,* 88 Neb. 638, 130 N. W. 263. See, also, *Carter v. State,* 98 Neb. 742, 154 N. W. 252; *Gerwick v. State,* 98 Neb. 69, 151 N. W. 982; *Ward v. State,* 58 Neb. 719, 79 N. W. 725.

"The basis of a jury's verdict is sufficient when the evidence affords any fair and reasonable ground upon which it may be sustained." *McCown v. Commonwealth,* 271 Ky. 265, 111 S. W. (2d) 389.

This case was carefully tried by an experienced judge, the jury were properly instructed, there was no prejudicial error in rulings on the evidence, and in my opinion, from an experience of 14 years as a district judge, this evidence amply sustained the verdict of guilty returned by the jury

in Fillmore county. I would, however, have made no objections to a reduction of the sentence to one year in the women's reformatory at York, because of the fact that the defendant is now upwards of 60 years of age.

CHARLES GREEN BRAINARD, APPELLANT, V. WILLIAM B. HALL ET AL., APPELLEES.
289 N. W. 845

FILED JAUNARY 26, 1940. No. 30697.

1. **Limitation of Actions.** Any promise to pay a debt or other existing liability in a cause founded on written contract, to prevent the running of the statute of limitations, must be in writing.
2. ———. Absence from the state will not extend the time in which a real estate mortgage foreclosure may be brought against a nonresident.

APPEAL from the district court for Dixon county: MARK J. RYAN, JUDGE. *Affirmed.*

Kingsbury & Kingsbury, for appellant.

McCarthy & McCarthy, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and FALLOON, District Judge.

FALLOON, District Judge.

On the 19th day of January, 1938, the appellant brought suit to foreclose a mortgage given on certain lands in Dixon county, Nebraska, against the appellees. The note and mortgage securing same were given August 20, 1891, for $2,500, due in one year, with interest at 6 per cent. It was given by William B. Hall and his wife, Jessie R. Hall, two of the appellees, to Charles Green, and duly recorded the next day in the office of the county clerk of Dixon county. The petition further alleges that on October 13, 1897, Charles Green assigned and delivered said note and mortgage to Mary Genevie Brainard, who died June 3, 1932,

and that the appellant is now the owner and holder of said note and mortgage. The petition also alleges that interest was paid on July 11, 1893, and thereafter until March, 1926, when the last interest in sum of $150 was paid. The original petition also alleges in paragraph 7 thereof that, notwithstanding said note by its terms became due and payable one year after date, it was orally, mutually agreed, by and between the appellee, William B. Hall, and Mary Genevie Brainard that said principal note should not be paid until the death of Mary Genevie Brainard, but that the interest should be paid annually.

This paragraph 7 was later amended to read:

"That the mutual oral agreement was arranged, made and entered into by and between the defendants, William B. Hall and Mary Genevie Brainard, assignee of said note and mortgage, with and in the presence of the plaintiff who is a son of the said Mary Genevie Brainard, who during the past thirty years or more of the life of Mary Genevie Brainard conducted her business and handled the business affairs of said Mary Genevie Brainard, and all of the parties well knew and understood said oral agreement, which afterwards at various times and in various ways was ratified by the defendant William B. Hall and that no demand at any time was ever made on the said William B. Hall for the payment of the principal sum of said indebtedness or any part thereof and that the same was not expected, demanded, or required during the life of Mary Genevie Brainard except only the interest payments thereon which became due annually, which facts were understood, arranged and agreed upon with the said William B. Hall."

Later, the appellant filed a substitute amendment to paragraph 7, in which it is alleged:

"That the mutual oral agreement entered into by the said Mary Genevie Brainard and the defendant William B. Hall, was about the year of 1900 or immediately prior thereto. The exact date which is unknown by the plaintiff and said oral agreement arranged, made and entered into by and between said parties in the presence and hearing

of this plaintiff, who is a son of the said Mary Genevie Brainard, and in the town of Waterville, county of Oneida and state of New York.

"Whereby it was agreed that the said principal note set out herein should not be paid until the death of Mary Genevie Brainard but that the interest thereon should and would be paid annually by the said William B. Hall, by reason of said oral agreement. That said principal sum of said note would not become due and payable until the third day of June, 1932, and that no demand was ever made upon the said William B. Hall for the payment of said $2,500, until after the death of the said Mary Genevie Brainard.

"That said oral agreement between the said Mary Genevie Brainard and William B. Hall was never modified, changed or revoked during the lifetime of the said Mary Genevie Brainard, and remained in full force and effect until the death of Mary Genevie Brainard on June 3, 1932."

The appellees then demurred to the petition for the reason that the petition and amendments thereto did not state facts sufficient to constitute a cause of action. The demurrer was sustained, appellant declined to plead further, and the petition was dismissed by the trial court, and its action is here for review.

The pleadings show that action on the mortgage note has long since been barred by the statute of limitations, unless the bar has been removed by the nonresidence of some of the appellees and by the oral agreement extending the due date to the time that Mary Genevie Brainard died. Section 20-202, Comp. St. 1929, provides that an action to foreclose a real estate mortgage can only be brought within ten years after the cause of action has accrued. There are other saving clauses and interpretations by this court, but they have no application to the pleadings in this case. This section above has been construed by this court to be always read in conjunction with section 20-216, Comp. St. 1929, which provides: "In any cause founded on contract, when any part of the principal or interest shall have been voluntarily paid, or an acknowledgment of an existing lia-

bility, debt, or claim, or any promise to pay the same shall have been made in writing an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment or promise."

A general demurrer admits all facts well pleaded, but does not admit conclusions. The oral promise to pay which the demurrer admits does not comply with the statute above set forth. The petition did not state it was in writing and therefore the petition and amendments were susceptible to the demurrer.

"A debt that is barred will be revived if the debtor in writing unqualifiedly acknowledges an existing liability." *Nelson v. Becker*, 32 Neb. 99, 48 N. W. 962.

"Where the debt is barred by the statute of limitations, no action can be maintained on the mortgage." *Hurley v. Estes*, 6 Neb. 386.

This proceeding is one *in rem*, and absence from the state will not operate to extend the time in which to commence the action. Section 20-213, Comp. St. 1929, provides: "Absence from the state, death or other disability shall not operate to extend the period within which actions *in rem* shall be commenced by and against a nonresident or his representative." This action was brought to subject the property mortgaged to the payment of the debt secured and could have been brought at any time within the limitation period, regardless of residence, and the statutes further provide for constructive service on nonresidents. As *Peters v. Dunnells*, 5 Neb. 460, says: "An action to subject mortgaged property to the payment of the mortgage debt is a proceeding *in rem*," and it goes on to say, "absence from the state, death or other disability of a nonresident, shall not operate to extend the time within which actions *in rem* shall be commenced by, and against, such nonresidents applies, to mortgages."

Hurley v. Estes, supra, lays down the same rule, which still obtains in this state.

The petition and amendments thereto do not allege facts sufficient to state a cause of action against the appellees.

It was proper to raise the bar of the limitation statute, and neither the oral agreement nor the nonresidence of some of the appellees will remove that bar. When a pleading discloses on its face that the action is barred by the statute of limitations, such bar may be raised by objection that the pleading does not state a cause of action. See *Eayrs v. Nason*, 54 Neb. 143, 74 N. W. 408.

The pleadings of the appellant under our statutes did not state a cause of action against the appellees. The district court rightfully sustained the demurrer, and its judgment must be affirmed.

AFFIRMED.

F. L. ALEXANDER, EXECUTOR, APPELLEE, V. ROY OMAN ET AL., APPELLANTS.
289 N. W. 847

FILED FEBRUARY 2, 1940. No. 30710.

1. **Mortgages.** The filing of a stipulation reducing the amount of the judgment in a decree foreclosing a real estate mortgage does not vacate the decree nor change the date thereof.
2. ———. To be effective, a request for a stay of the order of sale must be filed within twenty days after the rendition of the decree.
3. ———. "A sale will not be set aside for irregularities or errors not prejudicial to the party complaining." *Miller v. Lanham*, 35 Neb. 886, 53 N. W. 1010.

APPEAL from the district court for Lincoln county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

Hoagland, Carr & Hoagland, for appellants.

Jeffrey & Padley, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

SIMMONS, C. J.

This is an appeal from an order confirming a judicial

sale of land under a decree of foreclosure of a mortgage. The decree was entered April 10, 1937, fixing the amount due on the indebtedness at $6,960.50, and decreeing the foreclosure of the mortgage securing the same. The decree further determined that the defendant Roy Oman was personally liable for any deficiency. The statutory nine months' stay was granted to the defendants pursuant to their request made in open court.

On January 15, 1938, defendant Roy Oman filed an application praying for a modification of the decree as to amount, claiming that he relied upon the plaintiff to fix the proper amount and that the amount fixed was excessive. The application also recites that the note and mortgage were executed in 1934, and that a deficiency judgment was not authorized. No action appears to have been taken on this application, although the bill of exceptions shows that a stipulation was filed February 5, 1938, reciting that the amount of the decree should have been $6,403.85, and authorizing the clerk to correct the decree to show the amount due.

February 5, 1938, a præcipe was filed for an order of sale to satisfy the decree. The order of sale is not shown, but the sheriff's return shows the "amount of principal" due was $6,403.85 and a sale to one Bauman for $4,025. A motion to confirm the sale was filed March 15, 1938. On March 19, 1938, objections to confirmation were filed. There is no showing that any action was taken on either the motion to confirm or the objections to confirmation.

April 13, 1938, a præcipe for an alias order of sale was filed. The order of sale is not shown, but the sheriff's return shows the "amount of principal $6,403.85," principal and interest due $7,010.33, costs $76.62, total due $7,086.95, and a sale to the plaintiff for that amount.

On January 20, 1939, defendant filed lengthy "amended objections to confirmation of sale." On the same day, hearing was had, and the court confirmed the sale and ordered the sheriff to execute and deliver a deed to the purchaser. This appeal has been taken from that order.

Defendants present here, in part, the same objections presented to the trial court.

Defendants contend that they were entitled to a nine months' stay of the order of sale upon the decree beginning after the correction. The filing of the stipulation reducing the amount of the judgment did not vacate the decree nor change the date thereof. See *Hoyt v. Little*, 55 Neb. 71, 75 N. W. 56. The filing of the request for a stay of the order of sale to be effective must be made within twenty days after the rendition of the decree. Comp. St. 1929, sec. 20-1506. *Prudential Ins. Co. v. Nethaway*, 127 Neb. 330, 255 N. W. 26.

Defendants contend that the trial court erred in confirming the second sale, while the application for a modification of the decree was pending and while the return to the first order of sale and objections thereto were pending. It will be noted from the returns that the orders of sale fixed the amount which defendants stipulated was correct as the amount due on the decree, and that the property sold at the second sale for the full amount of the decree, interest and costs. This effectively disposes of the two objections urged against the decree. Prejudice to the right of the defendants is not shown.

This court has held: "A sale will not be set aside for irregularities or errors not prejudicial to the party complaining." *Miller v. Lanham*, 35 Neb. 886, 53 N. W. 1010.

The industry of counsel for defendants has caused them to suggest other errors in the proceedings of the trial court. These have been examined, and error prejudicial to the defendants has not been found.

The decree of the trial court is

AFFIRMED.

VIOLET MCCOWN, APPELLANT, V. ALVIN L. SCHRAM, ADMINISTRATOR, APPELLEE.
289 N. W. 890

FILED FEBRUARY 2, 1940. No. 30657.

1. **Automobiles.** Under the guest law of Kansas, a guest cannot recover damages for injury unless such injury shall have resulted from the gross or wanton negligence of the driver of the motor vehicle. Gen. St. Kan. 1935, sec. 8-122b.
2. ———. To constitute such gross and wanton negligence, the conduct must evince a willingness that harm might result therefrom, or a reckless unconcern as to the safety of the guest.
3. ———. If evidence discloses that the driver had been drinking intoxicating liquor to the extent that the jury might find he was under the influence thereof, and had disconnected the speedometer to conceal his high rate of speed, and failed to drive on the proper side of the road, these facts, with others, were sufficient to take the case to the jury.

APPEAL from the district court for Gage county: CLOYDE B. ELLIS, JUDGE. *Reversed.*

Hubka & Hubka and *R. M. Anderson,* for appellant.

Baylor, Tou Velle & Healey, contra.

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

PAINE, J.

This is an action for personal injuries sustained by a guest passenger in an automobile, which it is alleged was operated in gross and wanton negligence near Marysville, Kansas. It is brought by the mother of the minor guest against the administrator of the estate of the driver, who was killed in this accident. The evidence of the plaintiff included the offer of certain sections of the statutes of Kansas and a number of decisions of its supreme court which had been duly pleaded in the amended petition. When the plaintiff rested, the defendant demurred to the evidence, and the demurrer being sustained the trial court dismissed the action and overruled the plaintiff's motion for a new trial.

The defendant's demurrer to the evidence was based upon the following reasons: (1) The evidence of the plaintiff is insufficient to support a cause of action in favor of the plaintiff and against the defendant; (2) the evidence fails, as a matter of law, to establish that the defendant's decedent was guilty of gross and wanton negligence toward the plaintiff; (3) the evidence is insufficient to establish beyond a point where reasonable minds may differ that the defendant's decedent was guilty of gross and wanton negligence toward the plaintiff; (4) the evidence discloses that the defendant's decedent, as a matter of law, was not guilty of gross and wanton negligence toward the plaintiff; (5) the evidence discloses beyond a point at which reasonable minds may differ that the defendant's decedent was not guilty of gross and wanton negligence toward the plaintiff; (6) the evidence establishes that the defendant's decedent under the laws of Kansas was not guilty of gross and wanton negligence toward the plaintiff; (7) the evidence establishes that the defendant under the law is not liable to the plaintiff; (8) the evidence discloses that the plaintiff assumed the risk of riding with the defendant's decedent.

The plaintiff's case having been dismissed on a demurrer to the evidence, it is necessary to briefly set out the evidence which was before the jury. Violet McCown, the plaintiff, who was about 17 years of age, her cousin, Ruth Day, who was the same age, the deceased driver of the car, Arnold L. Schram, whose nickname was "Speck," an employee of Wilke's bakery in Beatrice, and his friend, Lewis Gaver, who had been his "buddy" and pal for about three years, were the four parties in the Chevrolet sedan at the time of the accident. About 8:30 p. m., June 25, 1937, Gaver went to the bakery to meet "Speck," and soon thereafter the two went to Beck's poolroom, where they each drank five bottles of regular beer in the time they remained there. They then drove to Howe's Barbecue, where each drank two more bottles of beer, and Schram then drove home to change his clothes. About 9:30 to 9:45 he returned

with Ruth Day and Violet McCown as guests in his automobile, and picked up Lew. After driving about Beatrice for a while, Schram said he wanted to see Jimmie Travis, a friend who had recently opened a restaurant at Marysville, Kansas, and leaving Beatrice at about 10:20 they drove to Marysville at about 45 miles an hour, stopping at Wymore, where Schram bought three more bottles of beer, which he drank on the way to Marysville, drinking the last bottle as he drove into Marysville.

When they reached the Travis restaurant, the proprietor was not there, and Schram and Gaver and two friends, Jim Winters and Art Axtell, went behind the restaurant to drink spiked "Coke" so the girls, who were sitting in the car, would not know it. Art Axtell testified that he opened each bottle of "Coke" and poured it out down to about an inch and a half from the top and filled it up with whisky, and each one of the four men drank a bottle of this spiked "Coke." Shortly thereafter they started home. Before leaving, the driver, Schram, disconnected the speedometer so the girls would not see how fast he was going, as he said he was in a hurry to get to Beatrice and finish some work he had to do at the bakery. They started west from Marysville, driving on a graveled road, rough like a washboard, with hardly room enough for two cars to pass. The accident occurred about a half mile west and three miles north of Marysville. Schram drove his car in the center of this graveled road, and some of the time on the west, or wrong, side of the road, and the evidence of some of the witnesses was that he was driving 60 to 70 miles an hour. The plaintiff, Violet McCown, who was sitting with Schram in the front seat, warned him several times to slow down, but he paid no attention to her. When she saw the lights of the other car approaching, Violet said, "My God, Speck, watch out." After the collision the driver endeavored to right his car, but failed, for the car turned completely over and landed on the west side of the road on its wheels. In turning over, the driver was thrown under the car and killed, and the plaintiff suffered many injuries, among which

were five cuts on her forehead and face, leaving scars which, it is explained, will interfere with her work as a beauty parlor operator.

The testimony shows that immediately after the accident the three survivors reached an agreement that they would protect the driver and say nothing at all about his drinking, which tends to account for a statement being signed by Ruth Day on July 8, in which she said that she had the feeling that Schram was driving carefully at the time of the accident, with both hands on the wheel, and paying strict attention to his driving, and that neither Arnold nor Lewis had anything to drink of an alcoholic nature. She testified that the gentleman who got her to sign the statement told her that the purpose of the statement was so that Mr. and Mrs. Schram could get "Speck's" life insurance, and claimed that she did not read the statement, nor was it read to her, but that the gentleman asked her some questions and wrote something down, and she signed it. This statement was identified as defendant's exhibit A, and introduced as part of the cross-examination of Ruth Day. She explained on cross-examination that out there in the road right after the accident Lew told them that the driver had been drinking, and the three of them agreed to say nothing about his drinking.

The plaintiff introduced in evidence several sections of the Kansas law relating to drinking and driving a car. Kansas did not repeal its state prohibition law after the Eighteenth Amendment was set aside, and section 21-2174, Gen. St. Kan. 1935, provides that driving while under the influence of liquor is a felony, and this section reads as follows: "Driver under influence of intoxicating liquor or drug injuring another. That it shall be deemed a felony for any one under the influence of intoxicating liquor, or any exhilarating or stupefying drug, to injure another person by reckless driving of a vehicle upon any public road, highway, street, avenue, driveway or alley within the state of Kansas."

The guest statute of Kansas is section 8-122b, Gen. St.

Kan. 1935, and reads as follows: "Right of guest to collect damages from owner or operator. That no person who is transported by the owner or operator of a motor vehicle, as his guest, without payment for such transportation, shall have a cause of action for damages against such owner or operator for injury, death or damage, unless such injury, death or damage shall have resulted from the gross and wanton negligence of the operator of such motor vehicle."

In a late Kansas decision, *Donelan v. Wright*, 148 Kan. 287, 81 Pac. (2d) 50, it is held: "The authorities will lead us to the conclusion that to constitute wantonness so as to permit recovery under G. S. 1935, 8-122b, the conduct must be such as to evince a willingness that harm might result therefrom, or as to evince a reckless unconcern that plaintiff might be injured."

"The meaning of this statute has been frequently considered and expounded in motor car accident cases arising since the enactment. The most recent of these are: *Aduddell v. Brighton*, 141 Kan. 617, 42 P. (2d) 555; *Murrell v. Janders*, 141 Kan. 906, 44 P. (2d) 218; and *Anderson v. Anderson*, 142 Kan. 463, 50 P. (2d) 995. In *Koster v. Matson*, 139 Kan. 124, 30 P. (2d) 107, 110, the action was by a guest against the driver of an automobile for injuries sustained in a motor car accident in Nebraska. The pertinent Nebraska 'guest' accident statute (Comp. St. Supp. Neb. 1935, sec. 39-1129) was substantially similar to our own. It was pointed out that wantonness is essentially different from negligence, not merely in degree but in kind of conduct." *Cohee v. Hutson*, 143 Kan. 784, 57 Pac. (2d) 35.

The Kansas court has held: "Independently of any statute it is negligence as a matter of law to drive an automobile along the highway on a dark night at such speed that it cannot be stopped within the distance that objects can be seen ahead of it." *Fisher v. O'Brien*, 99 Kan. 621, 162 Pac. 317, L. R. A. 1917F, 610. See, also, *Watson v. Travelers Mutual Casualty Co.*, 146 Kan. 623, 73 Pac. (2d) 64.

In Nebraska, Iowa, California, and Oregon the guest statutes specify as a distinct ground of liability the fact

that the driver was intoxicated, but such is not the case with the Kansas guest law. It is proper, however, for the jury to consider evidence of intoxication in determining whether the driver was guilty of gross and wanton negligence in attempting to drive at very high speed after he had consumed a large amount of intoxicating liquor. *Hackbart v. Rohrig,* 136 Neb. 825, 287 N. W. 665; *State v. Gloyd,* 148 Kan. 706, 84 Pac. (2d) 966; *Koster v. Matson,* 139 Kan. 124, 30 Pac. (2d) 107; *McGrath v. Nugent,* 133 Neb. 237, 274 N. W. 549.

The jury might also consider the evidence that the driver disconnected the speedometer on the automobile to conceal from plaintiff the excessive speed at which he intended to drive.

The jury might also consider the evidence to the effect that the driver of the car failed to keep proper lookout ahead, and at the time of the collision was either driving in the middle or to the left-hand side of a narrow road, and that after the collision the car landed over to the left of the main-traveled part of the road. *Morris v. Erskine,* 124 Neb. 754, 248 N. W. 96; *Larson v. Storm, ante,* p. 420, 289 N. W. 792.

The question of gross and wanton negligence under the guest law of Kansas is for the jury, where the evidence is conflicting, and from which reasonable minds might draw different conclusions.

In our opinion, the evidence of plaintiff was sufficient so that the trial court was not justified in taking the case from the jury and dismissing it.

REVERSED AND REMANDED.

PEONY PARK, INC., APPELLEE, V. SECURITY INSURANCE COMPANY OF NEW HAVEN, APPELLANT.

289 N. W. 848

FILED FEBRUARY 2, 1940. No. 30728.

1. **Insurance.** A fire insurance policy is simply a contract between the parties, and the usual rules for the construction of contracts apply to such policies.
2. ———. Insurance policies are prepared by experts, and it is consistent with both reason and justice that any fair doubt as to the meaning of the words of a policy should be resolved against the one who prepares it.
3. ———. If the provisions of an insurance policy are clear and unambiguous, then the rule of strict construction against the insurance company does not apply.
4. ———. While ordinarily insurance contracts are construed against the company writing them, touching any provision which is ambiguous, this is not true as concerns the location of the property insured, for a policy will not be extended to cover property not clearly within the express terms of the policy.
5. ———. When a fire insurance policy covers the "contents" of a certain dance pavilion "and additions," it is *held* that a refreshment stand built some 42 feet therefrom, connected therewith only by a sidewalk and a small conduit carrying pipes for the cooling system, which refreshment stand is covered by a separate policy of fire insurance, is not "an addition" to the main dance pavilion, although used in connection therewith.
6. ———. The word "contents," when applied to personal property in a building, is a term which should ordinarily have some definite fixed relationship to the building in which it is located, and to be fairly for use within it, or in connection therewith.
7. ———. When personal property, insured as "contents" of a dance pavilion, is removed therefrom and transferred permanently to a new building, which building is covered by a separate policy of fire insurance, such personal property is no longer covered by a fire insurance policy upon the "contents" of the said dance pavilion.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Reversed and dismissed.*

Ramsey & Welpton, for appellant.

James E. Bednar, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

PAINE, J.

Suit was brought for loss on a fire insurance policy which covered the contents of a dance pavilion. This policy was written June 4, 1934, and the premium was $35 for one year from that date. The amount of the policy was $2,000. A jury was waived, and the court found the value of the property destroyed was $2,684.05, and entered a judgment for the full amount of the policy, $2,000, from which the insurance company appeals, and for reversal claims the judgment is contrary to law and is not sustained by the evidence.

The property destroyed was in an outdoor refreshment stand, located some 42 feet from the main dance pavilion, and connected therewith by a concrete sidewalk and small conduit. The amusement park, of which this was a part, was called the Royal Grove, erected at a cost of $28,000. The main dance pavilion was 168 feet by 124 feet, a story and a half high, with basement, and was surrounded by a hedge. This particular insurance policy covered the "contents" of the dance pavilion in a very broad form, the portions of the paragraph relating thereto involved in this case reading as follows:

"Contents form
"Peony Park, Incorporated

"*$2000.00* On the 'Contents' of the premises occupied by the assured in the *one story, composition roofed, brick, frame and steel* building and basement and additions and known as Nos. *7718½ Dodge Street,* * * * Omaha, Nebraska.

"The word 'Contents' used in this contract is hereby declared to include all property fixed or movable belonging to said Assured, * * * liability being hereby specifically assumed on tools, implements, awnings, signs, * * * all of said property being covered while contained in, on or attached to the building above described and on and under sidewalks, platforms, alleys, streets, yards, areaways and

in and on conveyances and railway cars on tracks and on premises while within 100 feet of said building."

Adolph Musil, a real estate and insurance agent, was the broker who placed all of the insurance for Peony Park, Inc., and was a stockholder therein. He testified that he was at this place at least twice every week; that he was there a couple of days before the fire; that a policy in the "National Liberty" for $2,000 expired June 4, and as Fell & Pinkerton discontinued representing that company they rewrote it in the defendant Security Insurance Company. Mr. Musil told them they wanted the "Contents Form," with the broad coverage. He said he received a commission from the company on this policy. Mr. Baldwin, through whom Mr. Musil placed the insurance in suit, knew about the refreshment stand being erected, for on May 25 he wrote a $500 policy on the building known as the refreshment stand. The fact that the owners took out a distinct and separate policy on the refreshment stand just as soon as it was completed indicates clearly that there was no thought on the part of the owners that this new building, separated from the main dance pavilion by a distance of 42 feet, was to be considered, or was covered, as an "addition" to the main dance pavilion.

An examination of exhibit No. 2, being the statement of the fire loss, made out June 8, shows clearly that there were no chairs nor tables which had been transferred from the main dance pavilion temporarily, and which would doubtless be insured, under the terms of the policy, while out in the premises, under trees, within 100 feet of the main pavilion, but the personal property listed in exhibit No. 2 consisted for the most part of an electric refrigerator, cooling tanks, beer dispensing equipment, soda fountain, and other apparatus for dispensing beer, and soda fountain equipment, the plumbing bill for installing the same amounting to $195, and that the beer-cooling boxes, dispensing cabinets, fountain cabinets, insulation, and installation, including cabinet work, cost $500. These items for labor and material indicate definitely that this personal

property was permanently installed as fixtures in the refreshment stand, which building was insured under a separate policy; that little of this equipment, except several small items, in value about $100, such as a coffee urn, a cash register, toaster, and grill, could be taken into the main dance pavilion and used there.

The defendant insurance company insists that, if there is no uncertainty as to the meaning of an insurance contract, and the same is legal and not against public policy, it will be enforced. It further argues that the contents of the large dance pavilion were covered while on sidewalks, in or on conveyances, and on the premises while within 100 feet of the building, but that this does not cover such personal property when it has become the contents of a separate frame refreshment stand, and cites in support thereof the case of *Franklin Fire Ins. Co. v. Hellerick & Son*, 20 Ky. Law Rep. 1703, 49 S. W. 1066, in which it was held that a policy which covered additions to a building would not cover another building separate therefrom and located 20 feet away.

The defendant insurance company has also cited the case of *Leavitt v. National Fire Ins. Co.*, 88 Misc. 563, 151 N. Y. Supp. 71, in which it was held that fire insurance policies which covered the varnish and sundries contained in the warehouse, additions, and extensions at a certain street location did not include material in adjacent buildings.

An insurance policy is simply a contract between the parties, and the usual rules of construction of contracts apply to policies. If the provisions of the policy are clear and unambiguous, the rule of strict construction against the company does not apply. On the other hand, for many years it has been held that insurance policies should be very liberally construed to effect the intention of the parties. It has been held that, where there are conflicting clauses, the one which affords the most protection to the insured will control.

Insurance policies are prepared by experts, who anticipate all possible complications arising in every contingency,

and it has been held by many courts that they will adopt that view which will sustain rather than forfeit the contract of insurance. It is consistent with both reason and justice that any fair doubt as to the meaning of the words of a policy should be resolved against the one who prepares it, for if the terms of a policy are capable of two meanings, that is, where the true meaning is doubtful, the law favors such construction as will protect the insured, and not avoid the policy. See *Bone v. Detroit Nat. Fire Ins. Co.*, 261 Pa. St. 554, 104 Atl. 742; *Tischendorf v. Lynn Mutual Fire Ins. Co.*, 190 Wis. 33, 208 N. W. 917, 45 A. L. R. 856; *Queen Ins. Co. v. Patterson Drug Co.*, 73 Fla. 665, 74 So. 807, L. R. A. 1917D, 1091; *Mutual Life Ins. Co. v. Hurni Packing Co.*, 263 U. S. 167, 44 S. Ct. 90, 31 A. L. R. 102; *New Masonic Temple Ass'n v. Globe Indemnity Co.*, 134 Neb. 731, 279 N. W. 475; *Schultz v. John Hancock Mutual Life Ins. Co.*, 134 Neb. 885, 280 N. W. 165; *Davis v. Aetna Life Ins. Co.*, 128 Neb. 154, 258 N. W. 58; *Omar Baking Co. v. Employers Liability Assurance Corporation*, 130 Neb. 365, 264 N. W. 873; *Marsh v. Concord Mutual Fire Ins. Co.*, 71 N. H. 253, 51 Atl. 898.

There is another established rule which applies to the case at bar, for while it is ordinarily held that insurance contracts are construed against insurance companies touching those provisions that are ambiguous, it has been held that this is not true as concerns the location of the property which is destroyed, and it is the general rule that "the policy will not be extended to property not in the terms of the description in this respect." See 26 C. J. 93; 6 Cooley, Insurance (2d ed.) 4921; 4 Couch, Cyclopedia of Insurance Law, sec. 963; *Jefferson County Bank v. Insurance Co.*, 251 Ky. 502, 65 S. W. (2d) 474.

In the case of *Meriwether v. Phenix Ins. Co.*, 137 Mo. App. 96, 119 S. W. 535, it was held that a $2,000 fire insurance policy on an electric motor and connections, all while contained in a quartz mill building, did not cover a motor of a different size located in a powerhouse some 1,250 feet away from the quartz mill, the only connection being

the electric wiring which transmitted power and light to the mill.

"A policy of fire insurance which is expressly limited to loss occasioned while the insured property is located in a definite * * * place does not impose liability such as will follow the property upon its being removed to and destroyed at another and different place." *Liverpool & London & Globe Ins. Co. v. Georgia Auto & Supply Co.*, 29 Ga. App. 334, 115 S. E. 138. See *Druggists' Mutual Fire Ins. Co. of Iowa v. Shaw*, 170 Okla. 510, 41 Pac. (2d) 69.

The supreme court of Michigan held in the case of *Gersten v. Western Assurance Co.*, 265 Mich. 122, 251 N. W. 310, that, where the facts were undisputed, the question of whether a cottage was an outbuilding was one of law. A summer cottage had been constructed for use apart from the plaintiff's dwelling-house, and was located 50 yards therefrom, and furnished with household goods and personal effects taken in part from the main dwelling-house and placed in this summer cottage. Upon trial, the jury brought in a verdict that the cottage was an outbuilding within the coverage of the policy, but the Michigan court in reversing the judgment said that the household effects burned were not being stored in the cottage to relieve the dwelling-house, or as an aid to the use of it, but were placed therein for the purpose of using the cottage apart from the dwelling-house.

In like manner, in the case at bar the installation of the beer and soft drinks dispensing equipment in the refreshment booth was an entirely independent construction. Some of the equipment may have been taken out of the main dance pavilion, but when it was installed permanently in the newly-constructed refreshment booth it would in our opinion lose its connection with the main dance pavilion, and would no longer be covered as part of the "contents" of such pavilion. This is true because the word "contents" is a term which should have some definite, fixed relationship to the building in which it is to be used. When it is covered as being a part of that building, it must be fairly for use within it.

In our opinion, the district court was in error in entering judgment under the terms of the policy of insurance sued upon in this case. We believe there was no coverage under the policy, and the judgment is hereby reversed and the action dismissed.

REVERSED AND DISMISSED.

RUTH SPANGLER, GUARDIAN, APPELLEE, V. JERRY A. BROWN, APPELLANT.

289 N. W. 839

FILED FEBRUARY 2, 1940. No. 30758.

1. Appeal. "A verdict of a jury in a law action based upon conflicting evidence will not be disturbed on appeal unless clearly wrong." *Potach v. Hrauda*, 132 Neb. 288, 271 N. W. 795.
2. Trial. "Where an objection is made in behalf of appellant in respect to an instruction given by the trial court, the judgment will not be reversed, when the instructions, considered in their entirety, are not prejudicial to the lawful rights of appellant." *Lowell v. Buffalo County*, 123 Neb. 194, 247 N. W. 452.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

Frederick M. Deutsch and *W. J. Hammond*, for appellant.

J. J. Harrington and *Julius D. Cronin, contra.*

Heard before SIMMONS, C. J., ROSE, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

Plaintiff, guardian of Walter Spangler, a minor child, over the age of 14 years, and less than 15 years at the time of trial, brought this action for injuries sustained by her ward, charging defendant with negligence in operating his automobile and striking a horse being ridden by her ward from school on September 7, 1938, at about 4:30 p. m. The jury returned a verdict in favor of the plaintiff in the

sum of $2,000. Motion for a new trial was overruled. The defendant appeals.

On the day in question Walter Spangler, living with his brother, was riding his brother's horse to and from school, as was his custom. The horse was part Arabian, six or seven years old, weighed 950 to 1,000 pounds, and of gentle disposition. The boy would go from his brother's home one-fourth of a mile west on the section highway, then turn southwest onto an angling road, until striking the section-line to the west, and then proceed south. The schoolhouse was located on the southwest corner of the section. The road to the schoolhouse was an angling road. On the day in question the boy returned home on the same road. After talking to a friend in the meadow, he loped the horse until he reached a hill, and walked the horse from that point to a gateway. The hill was between the hay meadow and the angling road which joins the highway. The boy proceeded down the hill to the northeast out onto the highway, walking his horse. After leaving the angling road which crosses the meadow, he then went onto the highway, which runs east and west and is 24 feet from shoulder to shoulder. The road is sandy, has a track in the proximate center thereof, is rough and contains some ruts. The boy proceeded east on the right or south shoulder of the road, walking the horse. He noticed at a distance of about three-quarters of a mile an automobile coming toward him from the east, traveling in or near the middle of the road on the north side of the traveled portion of the highway. The horse continued walking a distance of 11 to 13 feet south of the center of the road until the car drew close, when the horse stopped, as was its habit, to permit the car to pass. The boy estimated the speed of the car at from 50 to 60 miles an hour. One witness testified that the defendant stated he was going 50 miles an hour. This statement the defendant denied, and he testified that his speed was 30 to 35 miles an hour. When the car had proceeded within a distance of 8 or 10 feet, it struck a rut, then turned suddenly in a southwesterly direction, about a 45-degree angle,

striking the left side of the horse and picking up the horse and rider, with the back of the horse toward the radiator, and with the rider's head down close to the front wheel of the automobile, the rider holding onto the horse's mane. The rider and horse were carried for a distance of 105 to 115 feet, and finally were thrown into the ditch on the north side of the road, which would be a distance of 10 to 12 feet.

The opening, sometimes called the gap and referred to as the "trail road," appears to be 12 to 15 steps from post to post, the estimates of the witnesses varying on this point, some placing the distance at as much as 45 feet. Wire has been removed and laid back, to permit the passage of vehicles and animals through this opening. According to the plaintiff's evidence, the accident occurred 150 to 225 feet east of the opening. The horse and rider were carried on the front of the defendant's automobile 105 to 115 feet west. The horse in some manner was caught or thrown onto the automobile, with its head in a forward position. After the accident, the boy stated, he was 60 feet east of the opening. At the time of the accident he was wearing a cap and carrying a dinner bucket which he lost.

About 15 or 20 minutes after the accident, Walter's sister and brother were driving on the same highway, and as they proceeded west the sister saw the horse lying on the north side of the road in the ditch, with its head facing south and its feet to the east. They started to look for Walter, went across the road and looked to see where the horse came out of the opening, then continued along east on the south side of the road for quite a distance, gauging the distance by the length of the courtroom, estimated to be 50 feet, stating it was three or four times its length. Arriving at this point, they found no more hoof tracks, but saw tracks where the horse apparently stopped. The sister observed the hoof marks along the south shoulder of the grade, extending over to the opening into the hay meadow east for a distance of 160 to 235 feet where the hoof marks stopped. The tracks of the automobile were fresh, came from an

easterly direction, "splitting the track;" that is, as if proceeding down the road generally about the middle at a point 10 to 20 feet east of the place where the hoof marks stopped. The tracks of the car then seemed to veer to the southwest over to the hoof marks from a distance of 10 to 20 feet. In this position the car tracks were going toward the southwest; then apparently the car straightened back into the road, and none of the car tracks appeared south of the ditch. The sister saw Walter's cap there, picked it up, and further down in the ditch lay his dinner bucket, with one bail off. She found an ornament, which will be later described, impregnated into the left hip of the horse the length of four or five inches. The horse was lying in the ditch on the north side, with its head facing south and its feet toward the east. This evidence is corroborated by the brother, who pulled the ornament out of the horse's left hip. He testified it had been implanted into the hip for a distance of about three inches. The injuries to the horse consisted of both hind legs broken at about the height of the bumper of the car, its left hip wounded, and the animal had to be killed. The injuries suffered by the boy were: The femur bone on the left leg was broken diagonally; his left hip dislocated, and injuries to his left side, left arm and shoulder.

The defendant, a man 53 years old, engaged in the life insurance and real estate business in Norfolk, and owner of land in the vicinity of the accident, testified, in substance, that the road in question was an average country road, with a grade thrown up and a track down about the middle of the road, which was sandy, with some chuckholes in it. When the defendant's automobile, which was a 1936 Buick coach, weighing 3,200 to 3,300 pounds, approached within 30 to 40 feet east of the opening or gap, Walter came from the hay meadow through the opening at a gallop in front of the car. Defendant stated he immediately applied his brakes, which were in good working condition, and stopped as soon as he could, but he was unable to avoid hitting the boy; that the bumper of his automobile struck the hind

legs of the horse as it was going north; that the horse naturally jumped as the car struck it, and proceeded to the north side of the road, and as it jumped it threw the boy; that his car came to a complete stop in about six feet after striking the boy; that immediately after the accident the boy was lying just north of the car; the horse was lying in the north ditch slightly in front or west of the boy. There is also testimony that a boy's cap was lying four or five feet from the horse, but was not picked up. Defendant stated the boy said to him, in substance, that his mother had told him not to gallop the horse through the opening in the meadow. The boy was taken to the home of defendant's tenant, and from there to a doctor for treatment. Other witnesses testified that the position of the horse in the north ditch after the accident was about the center of the distance between the two posts, constituting the opening or gap.

There is claim made with reference to shrubs and a growth of box elders, and a shelter belt planted in 1936, about 10 rods in width, consisting mostly of cottonwoods, along the road, as shown by the exhibits, which would have a tendency to obscure the vision of a driver proceeding west on this road and approaching the opening to the angling road into the meadow. However, this evidence is in direct conflict. In the event that plaintiff's theory of the accident is to be believed, such evidence is not material.

The evidence further shows that shortly after the accident, in the presence of two uncles, his mother and sister, the boy made a certain written statement to the defendant's counsel, which is in evidence; and that the statement is at variance with the testimony of the boy at the trial. In any event, his evidence, in its entirety, is for the jury, and they are the judges of its credibility.

The defendant first complains of error in that the verdict and judgment are contrary to the indisputable physical facts. In this connection, the evidence shows that the height from the surface of the road to the top of the bumper of the car is approximately 16 inches, the bumper extending

out from the right and left fenders three to four inches, and is about eight inches in front of the radiator grill. The distance from the radiator, as distinguished from the grill, out to the bumper is 16 inches; the radiator sets back of the grill in a radiator shell, a distance of eight inches; the bumper extends out eight inches in front of the grill. The grill is perpendicular.

The damage to the car after the accident consisted of the following: The radiator grill was broken, the bumper had been damaged, bent at a distance of one and a half feet from its left (and south) end, shoved in, pushing holes in the radiator; that shoved the radiator back; the radiator in turn was shoved back against the fan. The left front lamp, located between the radiator and the left front fender, was broken, and there was a slight dent in the left front fender. The automobile would not operate under its own power, due to damage to the radiator, causing it to leak, making the motor too hot. The top of the radiator was 49 inches above the traveled surface; the hood was not damaged. One of the lights between the radiator and shell was damaged. The distance from the ground to the radiator is four feet, one inch. The emblem, heretofore referred to, is molded into part of the grill and sets back from the front of the grill. The contention is that, before the contact with the ornament could be had, the horse would have to hit against the radiator shell and the grill and be shoved backward.

We have detailed the pertinent facts, including the physical facts, relating to this accident. From a consideration thereof, we cannot say that the physical facts are so conclusive as to bar submission of the plaintiff's case to the jury. The decisions cited by the defendant under this assignment of error are applicable if the facts so warrant, but such is not this case.

Defendant complains of certain instructions of the trial court as being prejudicial. The court gave an instruction, defining the duty of Walter Spangler in approaching and entering upon the highway from the trail road, stating that

his failure to abide by such duty would constitute negligence. The objection is that this instruction assumes a fact as established which is material to the case, when the evidence with reference thereto is in conflict; citing *Howe v. Provident Loan & Investment Co.*, 130 Neb. 469, 265 N. W. 255. In the instant case, the jury, by agreement of the parties and at the direction of the court, had the opportunity to view the premises. Such observation partakes of the nature of evidence. They saw the road in question, which was referred to in the instruction.

"Where an objection is made in behalf of appellant in respect to an instruction given by the trial court, the judgment will not be reversed, when the instructions, considered in their entirety, are not prejudicial to the lawful rights of appellant." *Lowell v. Buffalo County*, 123 Neb. 194, 247 N. W. 452.

We have carefully examined the instructions and conclude that, when considered as a whole, they properly and adequately state the law, and, under all the circumstances as developed by the record, are not prejudicial. The charged negligence of the respective parties in the instant case were questions for the jury's determination. See *Frish v. Swift & Co.*, 97 Neb. 707, 151 N. W. 165.

"A verdict of a jury in a law action based upon conflicting evidence will not be disturbed on appeal unless clearly wrong." *Potach v. Hrauda*, 132 Neb. 288, 271 N. W. 795.

The judgment of the district court is right and is

AFFIRMED.

ARCHIE STEWARD, APPELLANT, V. DEUEL COUNTY, APPELLEE.
289 N. W. 877

FILED FEBRUARY 2, 1940. No. 30837.

1. **Workmen's Compensation.** The facts and circumstances in the instant case are sufficient to determine that Deuel county was the employer of the claimant, within the meaning of the workmen's compensation law of Nebraska. Comp. St. 1929, secs. 48-114; 48-115, as amended (Laws 1933, ch. 90); 48-116.

2. ———. The evidence in the instant case is insufficient to determine the extent of the disability, if any, suffered by the claimant due to injuries received in the course of his employment, and, in such event, as contemplated by section 48-167, Comp. St. Supp. 1937, the cause is remanded for the purpose of procuring competent evidence, to permit the court to determine the extent of disability and the award of compensation to be made to the claimant, if any.
3. ———. Where a reasonable controversy exists, as between an alleged employer and an employee, as to the former's liability under the workmen's compensation law, such employer is not liable for penalty for waiting time, within the contemplation of section 48-125, Comp. St. Supp. 1935, during the time the cause is pending in the courts for final determination.

APPEAL from the district court for Deuel county: J. LEONARD TEWELL, JUDGE. *Affirmed in part and remanded for further proceedings.*

W. I. Tillinghast, for appellant.

Dallas A. Clouse and *Harry R. Ankeny, contra.*

Heard before SIMMONS, C. J., ROSE, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

This is a compensation case, originally tried to one judge of the compensation court, later to the compensation court sitting *en banc* on rehearing.

Archie Steward, the appellant, was awarded compensation at the rate of $10 a week for 300 weeks from September 20, 1933, less $2,124, paid by Deuel county, and in addition thereto the sum of $6.75 a week for the remainder of his life, on account of total permanent disability. From this award Deuel county appealed to the district court, where on September 5, 1939, the court entered judgment, finding that Archie Steward was an employee of Deuel county and entitled to compensation from the county, under the provisions of the workmen's compensation act, at the rate of $10 a week for 300 weeks, less $2,124 which had been paid by the county and less any sums paid since May 16, 1939. Archie Steward cross-appealed to the district court, alleg-

ing that the court erred in not awarding a penalty of 50 per cent. for waiting time at the rate of $5 a week for 293 weeks, in the amount of $1,465, and in not awarding needed and necessary medical attention and hospitalization, and in attaching costs to appellant. The district court declined to award penalty money as prayed for. From the judgment of the district court Archie Steward appeals, and Deuel county is cross-appellant.

The first question for determination is whether or not Archie Steward, at the time of receiving his injuries, was an employee of Deuel county, Nebraska. Deuel county is divided into three commissioner districts. By agreement, each commissioner is responsible for the upkeep and improvement of the roads and highways in his district. In this instance, two of the commissioners orally agreed with the mayor of Big Springs, Nebraska, that, in the event the village would employ and pay a foreman, the county would pay for the labor incident to some work to be done with reference to a highway. Dick Brown was recommended as foreman by the commissioner of the district which includes Big Springs. The foreman was to have charge of, direct and oversee, and employ such help as he might require. The work consisted of removing dirt which apparently was within the incorporated limits of Big Springs, to haul the dirt northeast of the village to fill in a low grade, to raise the grade on a highway running south out of the village and maintained by the county up to the village, and to fill in the highway out to the end of a bridge which crossed the South Platte river.

Archie Steward met Dick Brown on the street; Brown told him of the job and employed him at the rate of $2.50 a day for six days a week. While there is evidence that the needy were to be employed, in so far as Steward was concerned he was not employed for such reason. Steward was to shovel dirt into a wagon. He started work on September 19, 1933, and in the evening of the second day, while standing between the dirt bank and a wagon he was helping to load, he suffered an injury as the result of a cave-in which

buried him. He was subsequently removed to a doctor's office. Steward testified that at the time the county commissioner representing the district, in the absence of the foreman, directed the men to clean out the dirt. This evidence is in conflict, but the fact that the commissioner, who lived in close proximity, watched the progress of the work is not denied. It is noted by the record that the right to discharge workmen was not granted to or exercised by the foreman. He accepted suggestions from the commissioner as to who should be employed, where the parties were required to furnish teams. The rate of pay was evidently fixed by the county, and the workmen were paid from county funds, notably from the bridge and road-dragging fund. The record is void of any official action taken by the board of trustees of the village or by the county commissioners with reference to the oral agreement, and no contractual relation between the village and the county existed sufficient to create liability of one to the other, to compel enforcement of the agreement.

Subsequent to the injuries received by Steward, he entered into an agreement with Deuel county, under which he was paid the sum of $2,124 for hospitalization and medicine. This agreement was never approved, as provided by law, is unenforceable and void. However, it is evidence which gives a strong inference that the county stood in the relation of an employer to Steward. The following sections of the workmen's compensation law govern:

Section 48-114, Comp. St. 1929, in describing an employer, includes the state and every governmental agency created by it. Section 48-115, Comp. St. 1929, as amended (Laws 1933, ch. 90), using the terms "employee" and "workman" interchangeably, includes "every person in the service of the state or of any governmental agency created by it, under any appointment or contract of hire, express or implied, oral or written." Section 48-116, Comp. St. 1929, in construing the word "employer," provides: "Any person, firm or corporation creating or carrying into operation any scheme, artifice or device to enable him, them or it to

execute work without being responsible to the workmen for the provisions of this article, shall be included in the term 'employer' * * * and be subject to all the provisions of this article."

The court was not in error in finding that Steward was an employee of Deuel county.

The second question for our determination is whether or not the appellant received injuries that totally and permanently disabled him; whether solely because of such injuries he is unable to perform and obtain any substantial amount of labor, either in his particular line of work, or any other for which he would be fitted except for the injury, within the meaning of the workmen's compensation law. *Wingate v. Evans Model Laundry*, 123 Neb. 844, 244 N. W. 635; *Flesch v. Phillips Petroleum Co.*, 124 Neb. 1, 244 N. W. 925.

A careful reading of the medical testimony discloses the following: Dr. C. H. Smith, a resident of Big Springs since 1907, practicing medicine in that community since 1916, had been acquainted with Archie Steward since 1907. On September 20, 1933, he treated Steward professionally at his office at 6 o'clock in the evening. Steward at that time had a broken pelvis, was bruised and crushed otherwise. He was taken to the Redfield and Dent Hospital at North Platte. After returning from the hospital Steward was given electric treatments, physiotherapy, by Doctor Smith, "to get that joint so he could move it." Steward at that time was physically able to do only very light work. He required medicines which were furnished to relieve pain and, from a knowledge of Steward's condition, the doctor testified that he would not be able to do normal physical labor again; that Steward developed neuritis as the result of the accident.

Steward testified that he had worked in a café in Colorado for a month or two; that he drove a car; further, that since the time of his injury he was not able to do work that he had ordinarily done; that his work consisted mostly of farming and manual labor, and that his health previous to

the accident was good; also that he was not educated to do light work; that he was, at this time, able to walk and get around.

The foregoing evidence is substantially all the competent evidence with reference to the disability suffered by Steward. The trial court made a finding that such evidence was wholly insufficient to sustain the finding of the compensation court, to the effect that the appellant suffered total and permanent disability from such injuries; further, that such evidence does not show Steward to have suffered total disability for a period of 300 weeks, but fails to show what portion of 300 weeks such disability was only partial, and that he now suffers only partial disability, if any, from such injuries. The court then proceeded to fix the disability as provided for by subdivision 2, sec. 48-121, Comp. St. 1929, finding that the appellant's wages were at the rate of $15 a week, and that 66 2/3 *per centum* thereof should be paid him, or the amount of $10 a week for 300 weeks; determined that even though the agreement made by the appellant and Deuel county was nonenforceable and void Deuel county had paid the sum of $2,124, which should be deducted from the amount found due on the basis hereinbefore stated, and the balance to be paid in a lump sum.

The evidence is insufficient to disclose to this court the degree of disability suffered by Steward by virtue of his injuries, or enable the court to intelligently determine the amount of compensation due him. We have determined that any amount paid by the county, as stated in the judgment of the trial court, should be deducted from any compensation which should be finally awarded Steward.

Section 48-167, Comp. St. Supp. 1937, provides, in substance, that the Nebraska workmen's compensation court may make rules to carry out the intent and purpose of the act and laws amendatory thereof, with the exception of such as are committed to the courts of appellate jurisdiction. The act provides that the compensation court, or any judge thereof, or any appellate court may, upon the motion of either party, or on its own motion, require the produc-

tion of medical reports, X-rays, or, in fact, all matter that may be necessary in the determination of the rights of either party in any matter pending before any appellate court.

The penalty award which Steward seeks in his cross-appeal, as provided for in section 48-125, Comp. St. Supp. 1935, is not allowable. A reasonable controversy exists between Duel county and Steward as to the county's liability under the workmen's compensation act. Under such circumstances, the county is not liable for penalty for waiting time during the time the cause is pending in the courts for final determination. *Claus v. DeVere*, 120 Neb. 812, 235 N. W. 450; *Wilson v. Brown-McDonald Co.*, 134 Neb. 211, 278 N. W. 254.

The cause is remanded to the district court in order that evidence may be obtained, showing the extent of disability, if any, suffered by the appellant by virtue of the injuries received in the course of his employment.

AFFIRMED IN PART AND REMANDED FOR FURTHER PROCEEDINGS.

LAURA H. MARTINDALE ET AL., APPELLANTS, V. SAMUEL G. PANTER ET AL., APPELLEES.
289 N. W. 869

FILED FEBRUARY 2, 1940. No. 30670.

1. **Pleading.** "The failure to demur or the subsequent filing of an answer does not waive the right to object to a petition on the ground that it does not state facts sufficient to constitute a cause of action." *Sallander v. Prairie Life Ins. Co.*, 112 Neb. 629, 200 N. W. 344.
2. **Contracts.** In a transaction between a father and his adult children, they may deal with each other in reference to the property of either as with strangers and no confidential or fiduciary relationship will be presumed to exist between them as a result thereof.
3. **Judgment: VACATION.** In an action to vacate or modify a judgment or decree on the ground that it was obtained by fraud, the

plaintiff must allege and prove that he exercised due diligence at the former trial, and that his failure to plead his defense and to secure a just decision thereon was not attributable to his own fault or negligence.

APPEAL from the district court for Lancaster county: JOHN L. POLK, JUDGE. *Reversed.*

Harvey W. Hess and *Peterson & Devoe*, for appellants.

Frank A. Peterson and *Michael T. McLaughlin, contra.*

Heard before SIMMONS, C. J., ROSE, PAINE, CARTER and MESSMORE, JJ., and ELLIS and WENKE, District Judges.

WENKE, District Judge.

This appeal is from an order of the district court for Lancaster county modifying its decree of foreclosure entered at a prior term upon a petition of the defendants therein, who are appellees in this court; the plaintiffs in the lower court being the appellants here.

The appellants, Laura H. Martindale and S. G. Panter, Jr., the plaintiffs in the lower court, and who will be herein referred to as appellants, on September 10, 1935, filed their foreclosure action in the district court for Lancaster county making the appellees Samuel G. Panter and Catherine H. Panter, husband and wife, defendants, who will be referred to herein as appellees, and had summons issued and personally served upon each of the appellees. This petition, among other allegations, set forth that all items due under the note and mortgage therein being foreclosed drew and were drawing interest at 10 per cent. under the provisions of said note and mortgage. The appellees defaulted, and on November 20, 1935, a decree was entered finding the sum of $6,691.12 due, with interest at 10 per cent., which decree was approved by the attorney for the appellees. On October 14, 1937, in the same action, but at a subsequent term, the appellees filed their petition to modify the decree as to the amount therein found due and the interest due thereon, upon which petition summons was issued and

served upon the appellants. In their petition the appellees allege that on August 11, 1925, they executed and delivered to the Conservative Mortgage Company their note for $3,500 with interest at 5½ per cent. per annum, due September 15, 1930, on which they had paid all interest to and including interest due September 15, 1929; that shortly before the note came due the appellee Samuel G. Panter took up the matter of refinancing the loan with the appellant S. G. Panter, Jr., and that S. G. Panter, Jr., agreed to refinance the loan for the appellee at the same rate, and that pursuant thereto did on or about September 10, 1930, obtain an assignment thereof, and that S. G. Panter, Jr., never made any demand thereafter upon appellees for the payment of any interest, but suggested the note could run without such payment; that on September 10, 1935, the appellants filed their petition demanding 10 per cent. upon the coupon due September 15, 1930, upon the principal amount and taxes paid, and decree was entered allowing the 10 per cent. contrary to said agreement; that the appellant S. G. Panter, Jr., is a son of the appellee Samuel G. Panter and for many years father and son were engaged together in the practice of medicine at Ohiowa, Nebraska; that at all times the relationship of trust and confidence existed between father and son; that the father is now 85 years of age and retired from the practice of medicine and was so retired at the time of the transaction with his son in September, 1930; that because of the relationship between the father and son appellee relied upon the good faith of his son and believed he would carry out his agreement, and because thereof did not scrutinize as carefully as he otherwise might have done the foreclosure proceeding filed herein, but supposed that his son would relate all of the facts to his attorney and to the court and not take a decree for more than the agreement; that the son fraudulently concealed said facts from his attorney and the court. There are further allegations as to an attempted settlement between the parties but which are immaterial in this action.

To this petition the appellants demurred, which demurrer

was overruled, and they subsequently answered. Hearing was had on June 16, 1938, at a subsequent term to that at which the decree was originally entered, and an order was entered modifying the former decree herein entered as to the amount due, and the interest rate, finding for the appellees as to said agreement, and this appeal is from said order.

The first proposition of law relied upon by the appellees to sustain the findings of the lower court is: "Where a party answers over after an adverse ruling on his motion or demurrer and goes to trial on the merits of an issue he has elected to join, he waives the error, if any, in such ruling."

This court has, however, laid down a different rule in a case where the petition does not state facts sufficient to constitute a cause of action. In the case of *Sallander v. Prairie Life Ins. Co.*, 112 Neb. 629, 200 N. W. 344, the court held: "The failure to demur or the subsequent filing of an answer does not waive the right to object to a petition on the ground that it does not state facts sufficient to constitute a cause of action." And in *Markel v. Glassmeyer, ante,* p. 243, 288 N. W. 821, the court held: "By pleading to the merits, the defect that the petition does not state a cause of action is not waived."

For their second proposition of law the appellees cite the rule that, "In the absence of a bill of exceptions, it will be presumed that an issue of fact raised by the pleadings received support from the evidence and that such issue was correctly determined."

However, in the case *In re Estate of Raymond,* 128 Neb. 568, 259 N. W. 522, cited by appellees under this proposition, the court lays down the further rule that, "Where a cause is brought to the supreme court on appeal without a bill of exceptions or special findings, the only question that can be considered by the court is the sufficiency of the pleadings to sustain the judgment of the lower court."

This appeal is here on the transcript and without a bill of exceptions, and will be considered by this court only with reference to the sufficiency of the appellees' petition

as alleging facts sufficient to constitute a cause of action upon which the order of the lower court can be based.

Appellees' fourth and fifth propositions have no application to the facts as alleged in their petition. They refer to the duties and rights of persons standing in a fiduciary or confidential relationship to each other. The facts as pleaded by the appellees show that appellant was an adult son of the appellees, and that their practice of medicine in Ohiowa, Nebraska, had terminated prior to the transaction involved in this action, and that this note and mortgage was the only transaction between them. As was said by the court in the case of *Dick v. Albers*, 243 Ill. 231, 90 N. E. 683, which is cited under appellees' fourth proposition: "It cannot be said, as a matter of law, that because Henry Albers was a son of John Albers he thereby assumed a fiduciary relation to the latter in this transaction. The relationship existing between father and son where the son is an adult and doing business for himself is not necessarily a fiduciary relation to which the equitable doctrine of constructive trusts is applicable. In such case the son would have the same right to purchase the outstanding notes or mortgages against his father that any other person would, and while a fiduciary relation might be established in such case by less evidence than would be required where the parties were entire strangers, still there must be some evidence, outside of the mere blood relationship between the parties, to justify a court of equity in impressing a trust upon the transaction." And in the case of *Gregory v. Bowlsby*, 115 Ia. 327, 88 N. W. 822, quoting from the opinion: "A father bears no such confidential or fiduciary relations to his adult children as to bring transactions between them relating to the land of either under suspicion. He may deal with them as with strangers, and no presumption of fraud or undue influence obtains."

Thus, the purchase by the appellant, an adult son, of the note and mortgage of his father, the appellee, and their agreement as to the interest it was to draw created no confidential or fiduciary relationship between them, nor does

the fact that the relationship of appellant to his attorney is a confidential one create a confidential or fiduciary relationship between appellees and appellant.

From the allegations of appellees' petition, which have been hereinbefore fully set forth, it clearly appears that this defense existed and was known and available to the appellees at the time of the foreclosure action, and that the appellants, in the foreclosure action, clearly and definitely set forth their claim to the 10 per cent. as was provided by the terms of the note and mortgage, and that no confidential or fiduciary relationship existed between the parties; that had a careful examination of the pleadings been made they would have disclosed that the appellants were claiming 10 per cent., and the petition fails to set forth anything that was done by the appellants, or any duty imposed upon them which they failed to do, which in any way prevented the appellees from examining such pleadings, and it was through appellees' own fault and neglect that they failed to do so.

As was held in the case of *Secord v. Powers*, 61 Neb. 615, 85 N. W. 846: "In an action to vacate a judgment on the ground that it was obtained by fraud the plaintiff must allege and prove that he exercised due diligence at the former trial, and that his failure to secure a just decision was not attributable to his own fault or negligence." And in the case of *Miller v. Estate of Miller*, 69 Neb. 441, 95 N. W. 1010, the court has said: "But it is not sufficient for a party seeking the vacation of a judgment or decree to show that it was obtained by the fraud of his adversary, but he must go farther and show that the failure to obtain a just decision is not attributable to his own fault or negligence."

Under their third proposition of law the appellees cite the case of *Young v. Morgan*, 9 Neb. 169, 2 N. W. 237, which is in accordance with the above authorities and holds as follows: "To authorize the interference of a court of equity in such a case, it must appear that it is against conscience to permit the judgment to be enforced, and also that the plaintiff was prevented from making her defense by acci-

dent, mistake, surprise, or by fraud of the adverse party, and that she has not been guilty of neglect in not making her defense."

While it seems rather unfortunate in this case that a son should attempt to burden his father with the maximum of interest upon this obligation contrary to an agreement, as admitted by the demurrer, to charge less, yet it appears from the petition to modify the decree that such defense was available and known to the appellees in the original action, and that it was through their own neglect to carefully scrutinize the pleadings and discover that the appellants were claiming 10 per cent. interest that they find themselves in the present situation, and not because of any act of the appellants. "It is not the policy of the law to encourage actions of this kind. There must be an end to litigation." *Secord v. Powers, supra.* "It is in the highest degree essential to the welfare of the community, and to the respect which should be given to and the confidence which ought to exist in the judgments of a court, that they should not be set aside unless upon the strongest and most convincing grounds" *Scudder v. Evans,* 105 Neb. 292, 180 N. W. 254.

It thus appearing that the appellees have alleged no facts in their petition to modify the decree to show that any act of the appellants prevented them from pleading and having a trial of their defense, or that they exercised due diligence to obtain their rights in the original foreclosure action, or that their failure to carefully scrutinize the pleadings and find out the claim of the appellants, as it was clearly set forth in the foreclosure petition, and to set forth their defense in an answer thereto and to secure a just decision thereon was not attributable to their own fault or negligence, such petition fails to allege sufficient facts to constitute a cause of action upon which to base the decree of the lower court modifying its original decree of foreclosure entered on a prior term, and the demurrer of appellants thereto should have been sustained because of such insufficiency.

The case is therefore reversed and remanded, with directions to enter an order in compliance herewith.

REVERSED.

FEDERAL FARM MORTGAGE CORPORATION, APPELLEE, V. ELLA MAY POPHAM ET AL., APPELLANTS.
290 N. W. 423

FILED FEBRUARY 9, 1940. No. 30739.

Mortgages. Upon an appeal from an order confirming a judicial sale of real estate, this court, hearing the matter *de novo*, must be satisfied either that the property was sold for fair value, under the circumstances and conditions of the sale, or that a subsequent sale would not realize a greater amount. Unless so satisfied, the action of the trial court confirming the sale will be reversed, the sale set aside, and the cause remanded for further proceedings.

APPEAL from the district court for McPherson county: ISAAC J. NISLEY, JUDGE. *Reversed.*

Hoagland, Carr & Hoagland, for appellants.

Schaper & Runyan, Franklin L. Pierce and *Philip M. Wellman, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

SIMMONS, C. J.

This is an appeal from the confirmation of sale pursuant to a decree of foreclosure of a mortgage executed by husband and wife. This action is against the widow and heirs.

The land involved is a well-improved ranch of 3,204 acres. There is a first mortgage upon the premises to the Federal Land Bank of Omaha, upon which it was stipulated that there was due $10,800.74 at the time of the hearing of objections to confirmation on September 29, 1938. Subject to the above mortgage, plaintiff held a mortgage which it foreclosed in this proceeding. A decree for $4,965.61, bearing interest at 5 per cent., was entered September 27, 1937. The items included in the decree are not shown.

The total amount of delinquent taxes are not shown. The evidence shows the Federal Land Bank paid the taxes for 1933 to 1937, inclusive, and we assume that those taxes are included in the amount stipulated to be due the Federal Land Bank.

At the time of the sale on August 8, 1938, there was due on the decree, including costs, $5,264.81. This makes an indebtedness against the property at that time of over $16,000, or an indebtedness of $5 per acre. Plaintiff's bid at the sale was $2,264.81.

At the hearing on objections to confirmation, all evidence was furnished by defendants' witnesses, among whom there were interested and disinterested parties. When asked their opinion of the "fair and reasonable market value," they replied in substance that the land ought to sell for from $7 to $8 per acre. (At $7 per acre this would show a value for the land of $22,428.) However, defendants' witnesses knew of no one who would buy the land sold under the decree for the encumbrances against it, nor of any one who would bid a greater amount than that bid if it were offered for resale, nor of any sales in that community in recent years where land sold for more than $3 per acre. At the close of defendants' testimony, plaintiff's attorney stated: "The plaintiff wishes to waive a deficiency judgment against all defendants. We waive a deficiency of $3,000 in this case." Plaintiff states in its brief: "Plaintiff offered no evidence other than to raise its bid $3,000 over bid previously made at the sheriff's sale and to waive deficiency against all defendants." We accept the plaintiff's interpretation of its act.

This matter is before this court for trial *de novo*. *Federal Farm Mtg. Corporation v. Bostrom,* 136 Neb. 180, 285 N. W. 490.

We have the following elements to consider in determining whether or not to affirm the confirmation of this sale:

(1) Evidence by the defendants that the land is worth not less than $6,000 more than the sale price plus encumbrances.

(2) No positive evidence as to its value offered by the plaintiff contrary thereto.

Under these circumstances, we are not satisfied that the land "was sold for fair value, under the circumstances and conditions of the sale," nor "that a subsequent sale would not realize a greater amount." Comp. St. Supp. 1937, sec. 20-1531. See *Filley v. Mancuso*, 133 Neb. 538, 276 N. W. 157; *Redfield v. Collopy*, 133 Neb. 546, 276 N. W. 158.

The order confirming the sale is therefore reversed, and the cause remanded for further proceedings.

REVERSED.

L. A. RICKETTS, TRUSTEE, APPELLEE, V. FARRA MAE GEIL ET AL., APPELLANTS.
290 N. W. 254

FILED FEBRUARY 9, 1940. No. 30747.

Bills and Notes. Where mortgagors accept the services of an investment company in securing the extension of a mortgage debt, receive the benefits of said services, and give a promissory note in consideration of and in payment therefor, a sufficient consideration for the note is established.

APPEAL from the district court for Scotts Bluff county: CLAIBOURNE G. PERRY, JUDGE. *Affirmed.*

Howarth N. Olsen, for appellants.

James H. Anderson, Frank Barrett and *Elmer M. Scheele, contra.*

Heard before SIMMONS, C. J., ROSE, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

SIMMONS, C. J.

This is an action to recover judgment for the amount due on a promissory note. The defense plead was lack of consideration. Trial was to a jury. After both parties had rested, the trial court sustained a motion by the plaintiff for an instructed verdict. Judgment was entered for the plaintiff. The defendants appeal.

There is no serious dispute about the facts. The Lincoln Trust Company and the Lincoln Safe Deposit Company were separate corporations. The Deposit Company was owned entirely by the Trust Company. The two companies had the same officers and personnel, occupied the same quarters, and were "run as one company." On April 8, 1925, the defendants borrowed from the Deposit Company the sum of $16,000 and secured the same by a real estate mortgage. Said $16,000 was represented by 20 bonds in $500 and $1,000 amounts. These bonds were sold to investors. At the time of their execution and delivery in 1925, the defendants also executed and delivered to the Deposit Company a note for $800 which was the customary 5 per cent. commission charge. This $800 note was paid. The $16,000 principal debt was not paid.

The bonds for the $16,000 were payable to the Deposit Company, or order, at the office of the Deposit Company for the benefit of the holders thereof, and it was provided that, if any interest was not paid when due, or upon any default in the performance of the covenants of the mortgage, the bonds became due and payable at the option of the Deposit Company, and that, "If any default occurs in this bond, or in any of said bonds or in said mortgage, then the Lincoln Trust Company may, as trustee for the holder of this bond and of all of said bonds, without notice to, or hindrance from any one, declare this bond and all said bonds matured, due and payable."

The mortgage contained the following provision:

"In case of any of the bonds or coupons secured hereby are held by other parties than the mortgagee, the parties hereto hereby constitute and authorize the Lincoln Trust Company, of Lincoln, Nebraska, as trustee under this mortgage, for the use and benefit of the holders of the debts secured hereby, with full power and authority upon maturity of this mortgage or the debts secured thereby, either by the lapse of time or by failure to perform any of the terms or conditions hereof, to foreclose or enforce collection or payment of this mortgage and the debts secured thereby, or in

case of loss or damage to collect and receipt for insurance thereon; to satisfy and release of record or otherwise this mortgage or said debts; to make distribution of the proceeds thereof to the holders or owners of said bonds or coupons after payment of the costs and expenses thereof, and to do all things necessary or suitable to the performance of said duties and the exercise of said powers."

On March 26, 1930, the defendants executed an extension agreement reciting that the legal owners and holders of the bonds had extended the time of payment for a term of five years from April 8, 1930. This agreement recites the execution of 201 interest notes for the extended term and provided that the original mortgage should remain in full force as security for the full payment of the principal and interest. At the same time, the defendants executed separate agreements (one for each bond of the $16,000 loan), reciting that the Deposit Company had extended the time of payment of the bond for 5 years, and providing for the payment of interest during the term of the extension, at the office of the Trust Company. To these agreements were attached the interest notes referred to in the extension agreement. At the same time, the defendants executed and delivered to the Deposit Company the promissory note for $800 which is here in suit. Like the prior note, for the same amount, it was a commission note given for "services in extending the loan." These services include the placing of the bonds with new purchasers or persuading the then holders to retain them for the extended period.

The Trust Company and Deposit Company were adjudged bankrupt. The First Trust Company of Lincoln, Nebraska, as successor trustee to their trusts (because of the failure of the defendants to pay interest under the extension agreement beginning with that due in October, 1930, and the failure of the defendants to pay taxes for the years 1930, 1931, and 1932) declared the entire debt due and foreclosed the same.

The plaintiff as trustee for the Deposit Company brings this action to recover judgment on the second $800 note.

Have the defendants established a want of consideration for the note in suit? Defendants state their position as follows: "The note, then, was given because the loan was extended and for no other reason and if this extension was void the consideration was lacking and the note sued on cannot be enforced against the defendants." The defendants' contention that the extension agreement is void is based upon these propositions: (1) Because of the clause in the mortgage hereinbefore quoted, the Trust Company became the holder of the obligation and the only party authorized to grant an extension; (2) the Deposit Company did not have authority to extend the agreement; (3) it was not binding upon the Trust Company and therefore was void.

These contentions fail upon an examination of the record. The defendant, Charles A. Geil, testified that "this $16,000 mortgage" "was extended for a five-year term." That the extension was made by the Deposit Company and was agreeable to and accepted by the Trust Company, and that the rights and liabilities of all the parties were adjudicated upon the basis of the original instruments as altered by the extension agreements is established, without contradiction, by the record.

These contentions of the defendants go to the question of consideration, obligations assumed, and rights secured by the extension agreements. The question here presented is whether or not there was a consideration for the commission note.

"The presumption is that a promissory note is a valid obligation based upon a good and legal consideration, and the burden of showing that there was a want of consideration rests upon the defendant." *Farmers & Merchants State Bank v. Kuhn*, 125 Neb. 457, 250 N. W. 652. See Comp. St. 1929, secs. 62-201, 62-205.

"Value is any consideration sufficient to support a simple contract." Comp. St. 1929, sec. 62-202.

Services are a sufficient consideration for a promissory note if performed under an express or implied contract to

pay therefor or rendered in expectation of payment without regard to the value as compared with the amount of the note, and it is immaterial that the services were rendered without any express request or promise to pay therefor, where the maker received and accepted the services. 8 C. J. 228; 10 C. J. S. 615, sec. 151.

The consideration for the note in suit was the commission earned by the Deposit Company for services rendered in the extension of the $16,000 loan. The defendants received the benefit of that service. It was a sufficient consideration to support the promise to pay contained in the instrument in suit. *Mohr v. Rickgauer*, 82 Neb. 398, 117 N. W. 950; *United States Fidelity & Guaranty Co. v. Curry*, 126 Neb. 705, 254 N. W. 430; *Stebbings v. Klein*, 222 Mich. 503, 193 N. W. 232.

The judgment of the trial court is

AFFIRMED.

NEBRASKA STATE BUILDING CORPORATION, APPELLANT, V. CITY OF LINCOLN ET AL., APPELLEES.

290 N. W. 421

FILED FEBRUARY 9, 1940. NO. 30737.

1. **Taxation.** All nonexempt property in Nebraska is subject to taxation and for that purpose must be valued at its "actual value," which means "its value in the market in the ordinary course of trade." Comp. St. 1929, sec. 77-201.
2. ———. The valuation of nonexempt property as ultimately fixed by the board of equalization is final unless shown by clear and convincing proof to be erroneous.
3. ———. An erroneous and excessive valuation of property for the purpose of taxation, as fixed by the board of equalization upon complaint of the owner, may be corrected in a proceeding in error.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Reversed.*

Field, Ricketts & Ricketts, for appellant.

Clarence G. Miles, Frederick H. Wagener and *Ralph P. Wilson, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

ROSE, J.

This is a proceeding in error to review the action of the board of equalization of Lincoln in determining the value of lots 11 and 12, block 60, original plat of the city, for the purpose of taxation. The real estate described is situated at the southeast corner of O and Fifteenth streets and fronts on O street. There is a five-story brick office building on lot 12 which is 25 feet wide. Lot 11 is east of lot 12 and is also 25 feet wide. On lot 11 there is a two-story brick building, the first floor of which is leased for business purposes and there are living-rooms on the second floor.

Both lots, encumbered by mortgage and tax liens, are owned by Nebraska State Building Corporation, plaintiff. Defendants are the city of Lincoln and members of the city council sitting as a board of equalization.

The assessor fixed the value of the two lots as a unit at $59,500 for the purpose of taxation. Upon complaint by plaintiff that the assessment was excessive and that the actual value of the property did not exceed $30,000, the board reduced it to $52,500. To procure a further reduction, plaintiff took its complaint to the district court by a proceeding in error. The district court affirmed the decision of the board of equalization and plaintiff filed in the office of the clerk of the supreme court a transcript of the proceedings before the board of equalization and also the evidence adduced before that tribunal.

In a formidable argument on values in connection with an analysis of the evidence from the standpoint of plaintiff, counsel insist that no value of lots 11 and 12 in excess of $33,000 can be justified. On the contrary, defendants contend that no reduction can be made because the transcript of the proceedings does not contain a copy of the assessment showing the value fixed by the board of equalization and

that consequently there is no basis for any reduction. This position of defendants does not seem to be well taken. The record shows that plaintiff made a formal demand upon the board for a complete transcript, "including the assessment as made." The record discloses further that the complaint stated the property was valued by the assessor at $59,500 and that the board made a reduction therefrom of $7,000, thus fixing the value of the two lots and the improvements at $52,500. The record for review was so considered at the hearing in the district court and the parties on both sides in the supreme court discuss actual value for the purpose of the assessment. Under the circumstances the immaterial defect in the transcript, attributable as it is to defendants, is not sufficient to require an additional transcript at this stage of the litigation or to prevent a review of the proceedings before the board of equalization.

Is the maximum value of these lots and the improvements thereon $33,000 as argued by plaintiff? Values for the purpose of taxation must be tested by the rules of the statute:

"All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value. 'Actual value,' as used in this act, shall mean its value in the market in the ordinary course of trade." Comp. St. 1929, sec. 77-201.

The valuation ultimately fixed by the board of equalization is final unless shown by clear and convincing proof to be erroneous. *First Nat. Bank of Blue Hill v. Webster County*, 77 Neb. 813, 815, 110 N. W. 535. According to this standard of measure, the value of the two lots and the buildings thereon as fixed by the assessor and the board is far in excess of actual value and uncontradicted evidence so proves. The building on lot 12 is 50 years old. It has deteriorated in value annually since 1928. It is out of date for an office building or for any other current purpose. It does not produce any net income, but creates an annual deficit to be met by the owners. The assessor himself testified it was "100 per cent. obsolete." The evidence shows conclusively that the lot would be more valuable without

the building. The building, therefore, is an encumbrance on the lot and is a liability instead of an asset. It would cost $7,500, and the materials in the building, to wreck it and clear lot 12. A purchaser for "value in the market in the ordinary course of trade" would contemplate an income from his investment instead of a deficit. The wrecking of the building would therefore become necessary in determining actual value "in the market in the ordinary course of trade." There is convincing evidence that the value of the lot alone, encumbered as it is by the building, has an actual value of $24,000. Deduction of $7,500 therefrom for the cost of clearing lot 12 leaves $16,500, the value of both lot and building for the purpose of taxation.

The building on lot 11 is perhaps 30 years old, but the lot and the building thereon still yield the owners a net income and the building is not a burden or encumbrance on the land. The bill of exceptions contains proper evidence that the lot has a value of $13,000 and the building a value of $7,500 for the purpose of taxation. The sum of the three items, $16,500, $13,000 and $7,500, or $37,000, is therefore the value of both lots and buildings thereon, as they now stand, for the purpose of assessment by the board of equalization. Evidence of greater values has not been found in the record. It follows that the action of the board in reducing the valuation on complaint of plaintiff from $59,500 to $52,500 only, was erroneous. On this review it is reduced on lots 11 and 12 and buildings to $37,000 and the assessment likewise reduced.

JUDGMENT ACCORDINGLY.

MILLIE A. CHRISTENSON, ADMINISTRATRIX, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.
290 N. W. 246

FILED FEBRUARY 9, 1940. No. 30720.

1. **Master and Servant.** The liability imposed by the federal employers' liability act is one for the negligence of any of the

officers, agents or employees of the carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. 45 U. S. C. A. sec. 51.

2. ———: ASSUMPTION OF RISK. In an action brought under the federal employers' liability act for damages for personal injuries sustained prior to its amendment on August 11, 1939 (53 U. S. St. at Large, 1404, ch. 685, sec. 1), assumption of risk is a complete defense where there is no violation of a statute enacted for the safety of employees contributing to the injury or death of the injured or deceased employee. 45 U. S. C. A. sec. 54.
3. ———: ———. An employee of mature years will be held to assume the risk of such dangers as are normally and necessarily incident to the occupation in which he is engaged, whether he is aware of them or not.
4. ———: ———. If an employee knows or ought to have known of unusual and extraordinary risks connected with his employment, he must be held to have assumed them when he goes ahead with the work.
5. ———: ———. Directions of a superintendent to an employee to hurry does not avoid the defense of assumption of risk.
6. ———. The rule requiring an employer to provide reasonably safe places and structures for his employee to work upon does not extend to structures being constructed or demolished, where the successive temporary conditions through which they must pass during such operations are from their very nature dangerous.
7. ———: NEGLIGENCE. The failure of an employer to use the safer of two recognized methods of construction is not of itself negligence.
8. **Evidence** examined and *held* that the defense of assumption of risk was established and bars recovery.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Reversed and dismissed.*

Thomas F. Hamer, George C. Holdrege and *William J. Schall,* for appellant.

Gross & Crawford, Gordon A. Nicholson and *P. C. Rasmussen, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

CARTER, J.

This is an action against the Union Pacific Railroad Company to recover damages for the death of one Tom G. Christenson under the provisions of the federal employers' liability act. From a judgment for plaintiff in the amount of $15,000 the defendant appeals.

In the latter part of February, 1937, the deceased entered the employ of the defendant at Bennett, Colorado, as a structural steel worker in the construction of a railroad bridge at that point. The deceased was a journeyman steel worker of many years actual experience at the trade. The bridge under construction was a new six-span steel girder bridge and was being constructed in sections in conjunction with the removal of the old bridge in such a way as not to interfere with railroad traffic schedules. At the time involved herein, five spans of the bridge had been completed and the bridge gang was engaged in the construction of the west and last span.

A general description of the construction of the bridge is as follows: The piling for the new bridge were driven and capped. Heavy steel girders were then put in place on the piling lengthwise of the bridge. Thereafter sections of the old wooden bridge were removed and replaced with the floor beams, stringers, ties and rails of the new bridge. The two steel girders were each approximately seven feet in height and had a three-plate steel flange, 18 inches in width, on the top and bottom. The web of the girder was attached to the flange by angle irons riveted to the web and flange on each side of the web at both the top and bottom. At approximately every twelve feet a vertical angle iron was riveted to the web of the girder to which the floor beams were to be swung in and attached by bolting a second angle iron to the web of the girder and through the web of the floor beam. The floor beams were about 40 inches high, 16½ feet long, with a flange on both top and bottom. The structure also required lateral bracing to guard against side sway and vibrations caused by wind and the speed and braking of trains. This bracing was obtained by running

angle iron braces from the juncture of the girder and floor beam to a similar point on the next floor beam on the opposite girder. To tie the girder, floor beam and lateral brace together, a gusset plate was provided, which was eventually to be bolted to the top of the inside lower flange of the girder, the under side of the lower flange of the floor beam and to the under side of the lateral brace. It must be noted, however, that the floor beam, when properly installed, is connected to the web of the girder and does not rest upon the lower flange of the girder. Likewise, the gusset plate is patterned so that it fits around the angle irons attaching the floor beam to the web of the girder. The result is that the floor beam does not rest upon the gusset plate. The gusset plates come into the structure loosely bolted to the lower inside flange of the girder, with the result that they take a sloping position until they are bolted up tight. It was the general practice on this job to swing in the floor beam, temporarily bolt it in place, put in the stringers, ties and rails, and then return and bolt up sufficiently to carry railroad traffic. During this last operation the gusset plate is bolted to the top of the lower flange of the girder and bolted up to the lower flange of the floor beam. The deceased was engaged in performing this operation when he slipped and fell to his death.

The gusset plate is approximately 25 inches wide and 22 inches long. When in place it extends 6½ inches beyond the lower flange of the floor beam on each side of it and 15 inches beyond the lower flange of the girder on each side of the floor beam. The evidence is that the deceased, in tightening or drawing up the gusset plate had his left knee on the lower flange of the girder and the ball of his right foot on the corner of the gusset plate. The record shows also that the gusset plate was wet from moisture which had fallen during the morning. The lower end of the gusset plate was estimated to be from one and three-fourth inches to three inches lower than level. The evidence shows that deceased's right foot slipped off the inclined gusset plate, resulting in the accident.

It is contended by plaintiff that the accident and the resulting damage were due to the negligence of the defendant. The answer of the defendant denies that it was negligent, and asserts that the risks and dangers of the employment and particularly those resulting in the accident itself were open, obvious and known to the deceased and were assumed by him.

It is not disputed that the case falls within the provisions of the federal employers' liability act and that the liability imposed thereunder is for negligence. 45 U. S. C. A. sec. 51. Neither is it questioned that the rights and obligations of the parties under the act depend upon it and applicable principles of common law, as interpreted and applied by the federal courts. And, likewise, it is not questioned that contributory negligence will not defeat a recovery but will result only in a reduction of the damages in proportion to the amount of negligence attributable to the employee. 45 U. S. C. A. sec. 53. And, further, that the doctrine of assumption of risk applies in an action based on the negligence of the defendant unless exceptions within the act, having no application to the case at bar, control. 45 U. S. C. A. sec. 54. *Seaboard Air Line Ry. v. Horton,* 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062.

The deceased was doing the work of a lead man; in other words, he was the farthest out on the newly constructed bridge skeleton. Consequently, he was in the most dangerous position of any of the workmen. He had to do his work of temporary bolting up by clinging to the partially constructed bridge as best he could. He knew this, as he was a steel worker of many years experience. No repairman, inspector or scaffold builder preceded him, for he was the lead steel man on the job. He also knew that the gusset plate was loosely bolted to the girder because all the others had been attached the same way. Also, he had previously been down on the girder, floor beam and gusset plate to put in the temporary bolts when the floor beam was swung into position by the hoist. He knew the condition of the weather and undoubtedly of the effect of moisture upon

the painted gusset plate. He knew, or ought to have known, that the gusset plate was loosely bolted and in a sloping position because he was the only workman who had an opportunity to put it in any different position, and, in the second place, he was engaged in the very act of drawing up the gusset plate, which in itself charges him with knowledge that it was neither tight nor level. There is evidence in the record that the gusset plate was not tightened up until the floor beam was set, in order to leave the necessary slack to permit the insertion of all the bolts tying it to the girder and floor beam. To relate all the details of the evidence would unduly add to the length of this opinion. From a consideration of all the evidence, however, we conclude that Christenson's use of the gusset plate in the condition shown by the evidence was one of the usual and ordinary risks of his employment. There is evidence that the gusset plate was bent downward and that it was defective in this respect. This can make no difference in the result. Deceased knew or ought to have observed the condition of the gusset plate. We think that the applicable rule is that, when the risks were the usual and ordinary risks of the employment, knowledge of the condition, or a want thereof, by the deceased would be immaterial. He will be presumed to have assumed such risks, whether he knew of them or not. On the other hand, if the deceased knew or ought to have known the condition, he must be held to have assumed the risk, even though the risk may have been unusual and extraordinary. *Toledo, St. L. & W. R. Co. v. Allen*, 276 U. S. 165, 48 S. Ct. 215, 72 L. Ed. 513; *Boldt v. Pennsylvania R. Co.*, 245 U. S. 441, 38 S. Ct. 139, 62 L. Ed. 385; *Campbell v. Chicago, R. I. & P. R. Co.*, 120 Neb. 499, 234 N. W. 395.

It is contended that the defendant was negligent in not putting in the lateral bracing prior to swinging in the floor beam, thereby providing a better place for the workmen to work. There is evidence in the record that it was a proper practice to place the floor beam first. There is also evidence to the contrary. Comparative merits as to safety or utility are most difficult to determine. Ofttimes two methods for

doing a certain piece of work exist, each having meritorious points as to safety and expediency. It is clearly the rule that, if an employer chooses one of two recognized methods of doing a piece of work, the fact that he may have selected the one which did not prove to be the safer does not constitute negligence by the employer towards an employee subsequently injured. Such a choice of plans breaches no duty owed to the employee. *Baltimore & Ohio R. Co. v. Groeger*, 266 U. S. 521, 45 S. Ct. 169, 69 L. Ed. 419; *Southern Pacific Co. v. Seley*, 152 U. S. 145, 14 S. Ct. 530, 38 L. Ed. 391; *Louisville & N. R. Co. v. Davis*, 75 Fed. (2d) 849.

It is contended that the work in question was being done under emergent conditions for the reason that train schedules over the bridge had to be maintained. There is evidence in the record indicating that a general "hurry up" order had been given by the foreman in charge. This does not change the rule nor affect the result. *Chesapeake & Ohio R. Co. v. Kuhn*, 284 U. S. 44, 52 S. Ct. 45, 76 L. Ed. 157.

It is likewise contended that the defendant was required to provide a reasonably safe place to work. The rule ordinarily applied has no application when the employee is engaged in the construction or demolition of structures where the successive temporary conditions through which such structures must pass are in their very nature hazardous. *Armour v. Hahn*, 111 U. S. 313, 4 S. Ct. 433, 28 L. Ed. 440; *Kuptz v. Ralph Sollitt & Sons Construction Co.*, 88 Fed. (2d) 532.

Plaintiff contends that a reasonable inspection would have revealed the danger to the deceased, and the direction of the foreman for deceased to bolt up was a negligent act under the circumstances. The questions are ably answered in *Kuptz v. Ralph Sollitt & Sons Construction Co.*, *supra*, wherein the court said: "If the insecure condition of the form could have been ascertained by a reasonably prudent inspection, plaintiff was as much bound in duty to himself to exercise the prudence of making that inspection as was the defendant, and could have as easily discovered the danger. * * * Plaintiff being an adult experienced workman,

and the danger complained of being open and patent, defendant was under no obligation to exercise for plaintiff's safety any greater degree of care than plaintiff was willing to exercise for his own safety. Defendant did not direct plaintiff to go upon these forms, nor represent that these forms were safe. Defendant's superintendent in effect simply told the plaintiff the roof was ready for electrical work and to proceed with it. This was not a warranty that the forms were safe, nor an implied invitation to enter upon them as a safe place to work. Though it was customary for workmen to walk on these forms, plaintiff could have supported himself upon the steel girders which were in place. Choice of methods was entirely with plaintiff."

We necessarily come to the conclusion that the defendant was building the bridge in question by recognized engineering methods. There may have been, it is true, other methods which were safer, but the failure to use the best method is not in itself negligence. In any event, the deceased was an experienced structural steel worker and bridge builder who was familiar with the methods being used. He was in a dangerous place when he fell to his death. He knew it was a dangerous place, the nature of his trade required him to do dangerous work. He was familiar with the situation as it existed. We must necessarily hold that he assumed all the risks which the evidence shows he knew existed at that time. They were risks attendant upon a vocation in its nature very hazardous. We fail to find that the defendant violated any duty which it owed to this unfortunate employee. No negligent act of the defendant added to the risk of the employment, unless we should hold that the construction of a structure, temporarily dangerous by necessity, is of itself negligence, which, of course, is not the law. In any event, if any of the acts of the defendant could be construed to be negligent acts, the deceased assumed the risk and no recovery therefore can be had.

The judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

OTTO H. SCHMIDT, APPELLANT, V. CITY OF LINCOLN, APPELLEE.

290 N. W. 250

FILED FEBRUARY 9, 1940. No. 30652.

1. **Workmen's Compensation.** Where it appears that the plaintiff in a workmen's compensation case may have sustained a partial loss of use of his leg, while the testimony in the record is directed to the question of general industrial disability only, the cause may be remanded to have it determined whether any impairment of the physiological functions of the leg exists, and, if so, the extent thereof, or whether the purported loss of use is wholly affected and cultivated.
2. ———. A demand for payment of medical expenses under the workmen's compensation law is a claim for compensation within the meaning of section 48-133, Comp. St. Supp. 1939.
3. ———. A demand for payment of medical expenses, made within six months after the occurrence of an injury and under such circumstances as to manifest the intention to claim the benefits of the workmen's compensation law, is sufficient to support the employee's right to institute proceedings within a year to recover every benefit which has then accrued under the law.
4. ———. Where any finding of fact, upon which the award of the district court in a workmen's compensation case depends, is not conclusively supported by the evidence, it is our duty on appeal to consider the entire cause *de novo* upon the record. Comp. St. Supp. 1939, sec. 48-174.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Reversed.*

Clifford L. Rein, for appellant.

Clarence G. Miles and *Frederick H. Wagener, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

JOHNSEN, J.

This is a proceeding under the workmen's compensation law, which was dismissed by the district court and is here on an appeal by plaintiff.

Plaintiff claims to have been injured on August 29, 1936, while employed by defendant as a city fireman. He says

that he fell on his right hip and buttock, while carrying a hose line into the basement at a fire. No one saw the accident, and the record seems to imply a doubt in the minds of some of the other firemen whether it ever occurred. He was on a twenty-four hour shift at the time and remained on duty all day and night following, apparently without making any report of it to his officers. In the afternoon of the next day, however, which was his day of rest, he called his family physician, and the latter telephoned the captain of his company that he would not be on duty the following morning, because of his leg. The personal records of the fire department contain conflicting entries, there being at one place a notation, "O. Schmidt, off sick," and, at another, an entry, "O. Schmidt off—alleged injury." Six days later plaintiff was released by his doctor and was given a certificate that he was able to resume his duties. At that time a notation was made, "O. Schmidt in from sick leave."

Defendant contends that the evidence does not satisfactorily establish that plaintiff ever sustained an accident, but this contention we shall answer with the simple statement that the facts above detailed, when considered with the findings and diagnosis of plaintiff's doctor on the day after the fire, are sufficiently convincing that an accident occurred. Some of the evidence by which it is sought to establish the other necessary elements of plaintiff's case is not so convincing, however.

Plaintiff says that he has been disabled ever since the date of the accident, although he claims also that his condition became progressively worse after he was discharged from the fire department some months later. He testified that, from the time of the accident, he never was able to do his previous work, was given lighter duties, was relieved from drills, and was assisted in his tasks by other firemen. This statement, however, is disproved by his officers and fellow firemen. The evidence clearly establishes that he performed all of his previous duties, without any manifestation of disability or handicap, from the time he returned to work on September 6, 1936, until his discharge on January

3, 1937. He was discharged because the officers regarded him as an agitator and a troublemaker. Among other things, he had previously cursed an officer when he was requested to perform a certain task, and, on the occasion of the fire involved in this proceeding, he had officiously attempted to give orders, without actual authority to do so. He knew that he was in disfavor and sensed that it was only a question of time until he lost his job. At one time he declared to another fireman, "They don't give me no raw deal; I'm going to the hospital and go in a cast, and I know I'll beat them." This statement is not without significance, in the light of subsequent developments.

From September 6, 1936, until after his discharge, plaintiff had neither sought nor apparently needed further medical attention. Following his discharge, he began to walk with a limp and to use a cane. He claims that he limped while he was still employed at the fire station, but the testimony of thirteen other firemen disproves this assertion. On July 30, 1937, just before the present proceeding was commenced, he again consulted Dr. George Lewis, his family physician, for the first time since September 5, 1936. About thirty days later, and after compensation proceedings had been instituted, Dr. Lewis began to administer diathermy treatments. In due season, he was sent to the office of Dr. Arthur L. Smith, and still later to that of Dr. Czar Johnson, for examination, report, and expert testimony. Drs. Lewis, Smith and Johnson all gave him blue ribbons for total and permanent disability. The cause of the disability was declared to be traumatic neuritis of the right sciatic nerve, a right sacro-iliac strain, and a rotation of the bodies of the lumbar vertebræ.

The compensation court directed an examination to be made by a medical advisory board consisting of Dr. Clayton Andrews, Dr. John C. Thompson, and Dr. Charles H. Arnold. The members of this board were of the opinion that plaintiff was not suffering from any disability attributable to the accident. Dr. Arnold testified that, while plaintiff walked with a slight limp and rotated the toes of

his right foot outward about 5 per cent. more than those of his left foot, this would not disable him in his work, nor could he discover any physical cause for it. He and the other two members of the advisory board did not believe that there could have been any recurrence of the injury so long after the accident had occurred and under the circumstances that plaintiff claimed. Dr. James E. M. Thomson, an orthopedic specialist, also testified that he could find no evidence of a sacro-iliac strain or of traumatic neuritis. As he put it, "I tried my best to find something." He and Dr. Arnold and Dr. Rowe, a roentgenologist, further declared that the X-ray films produced by Dr. Smith did not show any pathological rotation of the bodies of the lumbar vertebræ, but indicated merely a slight twist of the pelvis by the patient on the X-ray table at the time the films were taken. Motion picture films taken of unguarded actions of plaintiff clearly demonstrate that he is not suffering from total disability.

In this situation we are unable to agree with the finding of the workmen's compensation court, initially and on rehearing, that plaintiff is totally disabled. The opinion of the medical advisory board and of defendant's expert witnesses appears to be that plaintiff has not suffered any industrial disability as a result of the accident. It is shown, however, that he walks with a slight limp and an outward rotation of his right foot. It may be that this does not involve any handicap in industrial employment, which appears to have been the test applied to the situation by the medical experts on both sides. This does not exclude the possibility, however, that some limitation may have resulted in the physiological functions or movements of his right leg. If so, he is entitled to compensation under subdivision (3) of section 48-121, Comp. St. 1929, irrespective of whether an industrial disability is present or not. Perhaps the testimony of defendant's doctors must be construed to imply that the limp and outward rotation of the foot are wholly cultivated. We are not willing, however, to pass judgment upon that question at the present time, and, in

fairness to plaintiff, we shall permit the case to be remanded to enable testimony to be taken on whether such an impairment exists, or whether the limp and foot rotation are purely affected.

Taking the view, as we do, that the weight of the evidence clearly establishes that total disability does not exist, and that it further shows that plaintiff was able to have carried on his previous occupation or other industrial employment had he not been discharged, we necessarily must hold that a temporary disability allowance is not involved. The fact that since the institution of this proceeding Dr. Lewis has undertaken to administer sporadic diathermy treatments to plaintiff is not persuasive.

The bill of Dr. Lewis for the medical care given plaintiff at the time of the accident should be allowed by the trial court, and if it be determined that plaintiff's limp and foot rotation are not wholly affected, he should, as a matter of fairness, be allowed payment also for the subsequent treatments shown in the record, even though their necessity and utility are questionable. Should it be found that some limitation of the functions of plaintiff's leg actually exist, and that his limp and foot rotation are not mere affectation and cultivation, he should be reimbursed for the initial bill of Dr. Arthur L. Smith, as a diagnosis made for treatment purposes, although the examination was not made until after the institution of this proceeding. The second bill of Dr. Smith and the bill of Dr. Johnson are charges for examinations made wholly for testimony purposes, and so are not chargeable against defendant.

In making disposition of the cause on its merits, we have hurdled, for the moment, one or two contentions of the parties, and these we now turn to discuss. We have previously indicated that the compensation court, on initial hearing and on rehearing *en banc*, entered an award in favor of plaintiff for total disability. Because a rehearing was had in the compensation court, the appeal which defendant took to the district court was necessarily, under section 48-174, Comp. St. Supp. 1939, in the nature of an error

proceeding. Since the disability award made by the compensation court found support in the testimony of Drs. Lewis, Smith and Johnson, the district court held that it was precluded from trying the case *de novo* and therefore was obliged to confirm and ratify the finding of the compensation court on this issue. It vacated the award of the compensation court and dismissed the proceeding, however, on the ground that plaintiff had failed to make the necessary claim for compensation within six months from the date of the accident. The record shows that, within three weeks of the time of the accident, plaintiff requested the chief of the fire department to pay the medical bill of Dr. Lewis for attending him until his return to work. The chief refused to do so, possibly because of the doubt that appears to have been shared by the members of the fire department, whether plaintiff had actually sustained an accident at the fire. Plaintiff made no further claim for compensation, but on August 18, 1937, within a year of the date of the accident, he instituted this proceeding in the compensation court.

The requirement of section 48-133, Comp. St. 1929 (*Id.* Comp. St. Supp. 1939), that a claim for compensation must be made within six months after the occurrence of an injury, has been previously held to be a condition precedent to a right of action under the workmen's compensation law. *Park v. School District,* 127 Neb. 767, 257 N. W. 219. In the case of a latent injury, the time, of course, does not commence to run until the employee has or is charged with knowledge that disability is resulting. *Travelers Ins. Co. v. Ohler,* 119 Neb. 121, 227 N. W. 449; *Scott v. State, ante,* p. 348, 289 N. W. 367. Medical expenses are compensation rights within the meaning of the workmen's compensation law (*Baade v. Omaha Flour Mills Co.,* 118 Neb. 445, 225 N. W. 117), and a demand for payment of medical expenses is necessarily a claim for compensation, where it is made under such circumstances as to manifest an intention to claim the benefits of the statute. Giving to the compensation law the liberal construction to which it is entitled, we

must accordingly hold that, where a claim for any compensation benefits is made within six months after the occurrence of an injury, this is sufficient to support the employee's right to institute proceedings within a year, to recover every benefit which has then accrued under the law. Other courts have so held. *New Staunton Coal Co. v. Industrial Commission*, 304 Ill. 613, 136 N. E. 782; *Aiello v. Ford Motor Co.*, 273 Mich. 15, 262 N. W. 726. It is not necessary for the employee to specify the extent of the benefits to which he thinks himself entitled, and unless he attempts to conceal the scope of his rights for the purpose of misleading the employer, and the employer is in fact prejudiced thereby, the requirement of the statute is sufficiently met by a claim or demand for any compensation right, sufficient to advise the employer of his intention to bring the injury under the statute and to avail himself of its provisions. The fire chief, as one of plaintiff's superior officers, was a proper person under the regulations and practice of the department, as disclosed by the record, on whom to make the necessary claim or demand in this case. It follows that the district court erred in dismissing the proceedings on the ground that plaintiff had failed to comply with the statutory requirement for making claim.

The district court, as has been indicated, held that, since there was some evidence to support the finding of the compensation court on the question of total disability, it could not review that finding on error. Plaintiff contends that, since defendant took no cross-appeal from the holding of the district court, we are not at liberty to try the case *de novo*. Such cross-appeal could have accomplished nothing. It is our duty to give the compensation law a liberal interpretation, and to avoid setting up procedural snarls not imposed by the legislature, which are designed to trip either party and to prevent the supreme court from assuming jurisdiction to determine the merits of a case. Section 48-174, Comp. St. Supp. 1939, expressly imposes upon us the obligation to try the case *de novo* on the record, where any finding of fact upon which the judgment of the court has

been made to depend is not conclusively supported by the evidence. Here, the erroneous finding of the district court that plaintiff had failed to make timely claim for compensation, upon which the judgment was based, left the case in our lap for trial *de novo* under the statute.

The judgment is reversed and the cause remanded to the district court, with directions to remand it in turn to the compensation court for proceedings in accordance with this opinion.

REVERSED.

FEDERAL FARM MORTGAGE CORPORATION, APPELLEE, V. ELIZABETH T. CRAMB ET AL., APPELLANTS.

290 N. W. 440

FILED FEBRUARY 16, 1940. No. 30735.

1. **Mortgages.** Section 20-2142, Comp. St. 1929, provides that the district court may authorize an action at law to be brought upon a note which has been secured by a mortgage.
2. ———. A mortgagee can pursue only one remedy to collect his debt at a time. He may foreclose his mortgage in a court of equity, or he may bring a suit at law upon his note.
3. ———. After a mortgagee has foreclosed his mortgage in a court of equity, and sale has been had, confirmation entered, deed delivered, and the foreclosure case is at an end, he may, if authorized by the district court, withdraw his note and bring a law action thereon.
4. ———. The construing together of a note and mortgage simply means that, if there are any provisions in one which limit or explain the provisions of the other instrument, they will be given such effect as will carry out the intent of the parties.

APPEAL from the district court for Jefferson county: CLOYDE B. ELLIS, JUDGE. *Affirmed.*

W. J. Moss and *Melvin Moss*, for appellants.

Hartigan & Skultety, Franklin L. Pierce, Philip M. Wellman and *William W. Graham, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

PAINE, J.

This is an action at law upon a promissory note, in which the Federal Farm Mortgage Corporation asked judgment for $500, with interest thereon at 5 per cent. from April 15, 1938, together with costs. The defendants demurred to the plaintiff's petition, which demurrer was overruled, and the defendants electing to stand on their demurrer, judgment was entered in favor of the plaintiff and against the defendants. As will be seen by further statement of the facts, this resolves itself into an action at law for a judgment for the balance of a mortgage debt remaining unsatisfied after the foreclosure of the mortgage.

The action was commenced in the district court for Jefferson county on December 3, 1938, and the defendants were personally served with summons. The plaintiff, Federal Farm Mortgage Corporation, is a corporation duly organized under an act of congress known as the Federal Farm Mortgage Corporation Act (12 U. S. C. A. sec. 1020 *et seq.*). The principal place of business is in Washington, D. C. The land bank commissioner is an officer of the Farm Credit Administration, which is an executive and administrative agency of the United States government, which office was created by the Federal Farm Loan Act (12 U. S. C. A. sec. 653). This office was transferred from the Treasury Department to the Farm Credit Administration, and the name of the office was changed from farm loan commissioner to land bank commissioner (12 U. S. C. A. sec. 638-a). Additional statements about this federal set-up will be found set out at length in the opinion by Judge Rose, recently released, entitled *Federal Farm Mtg. Corporation v. Hughes, ante,* p. 454, 289 N. W. 866.

On July 23, 1935, the defendants secured a loan from the land bank commissioner, for which they gave their promissory note in the sum of $1,900, bearing 5 per cent. interest from September 18, 1935, and payable semiannually on the 1st day of April and October. The principal sum was payable on an amortization plan, in 20 equal instalments of $95 each, the first instalment being payable April 1, 1939,

the last payment to be due and payable October 1, 1948. To secure the payment of said note, the defendants gave a mortgage to the land bank commissioner, subject only to a prior mortgage in favor of the Federal Land Bank of Omaha in the principal sum of $5,500, bearing date July 23, 1935, and recorded in book 83, page 87, and the second mortgage given to the land bank commission under date of July 23, 1935, was filed for record August 15, 1935, and recorded in book 83, page 89, of the mortgage records of Jefferson county, Nebraska.

It is further alleged that said land bank commissioner made said loan in his own name, but on behalf of the plaintiff herein, the Federal Farm Mortgage Corporation, pursuant to an act of congress, found as amended in 12 U. S. C. A. sec. 1016-g, and that the plaintiff is, and ever since has been, the owner and holder of said note.

The defendants failed to pay the interest instalments, as provided by the terms of the note, and the plaintiff thereupon elected to exercise its option to declare the whole of the balance of the principal of said indebtedness to be due and payable in the amount of $2,030.63, the same covering the unpaid principal of $1,900, the interest instalment due April 1, 1936, and the interest instalment due October 1, 1936, each in the sum of $47.50, and the accrued interest to February 15, 1937, in the sum of $35.63, and the plaintiff on March 5, 1937, brought action to foreclose said mortgage.

On May 14, 1937, decree of foreclosure was entered, finding the amount due plaintiff $2,077.39, with interest at 5 per cent. from May 14, 1937. An order of sale being issued, said property was sold by the sheriff on March 21, 1938, for the sum of $1,725.03, and the sale was confirmed April 15, 1938. As said sale did not realize a sufficient amount to pay the amount found due the plaintiff on said note, this action at law was brought on the note, and the prayer of the petition is that the plaintiff, Federal Farm Mortgage Corporation, prays judgment against defendants in the sum of $500, with interest at 5 per cent. from April 15, 1938.

To this petition the defendants filed a demurrer December 24, 1938, on the following grounds: (1) That the court has no jurisdiction of the persons or the subject of the action; (2) that there is another action pending between the same parties for the same cause; (3) that the petition does not state facts sufficient to constitute a cause of action.

On April 19, 1939, the demurrer was argued and overruled. Defendants electing to stand upon their demurrer, cause came on for trial May 5, 1939; jury waived; trial to court; finding in favor of plaintiff, and judgment entered for $526, with 5 per cent. interest from date, from which judgment defendants appeal, and supersedeas bond given in the sum of $600.

The alleged errors of the trial court relied upon for reversal are in overruling the demurrer, and in assuming jurisdiction to enter a judgment in an action at law upon the note and mortgage which had been foreclosed and the property sold under an order of sale to satisfy the same. In support thereof, the defendants cite chapter 41, Laws 1933, which act purported to divest district courts of the power to enter a deficiency judgment in actions for the foreclosure of real estate mortgages. This act amended section 20-2141, Comp. St. 1929, to read: "When a petition shall be filed for the satisfaction of a mortgage, the court shall have the power only to decree and compel the delivery of the possession of the premises to the purchaser thereof." This act of 1933 was passed with an emergency clause, and took effect April 26, 1933, and the defendants contend that it applies to all mortgages executed after April 26, 1933.

To meet these contentions of the defendants, the plaintiff argues that chapter 41, Laws 1933, does not divest district courts of jurisdiction of actions at law for the recovery of the unpaid balance of a mortgage debt subsequent to the foreclosure of the mortgage. The plaintiff contends that chapter 41 has no force and effect with respect to actions at law.

In the case at bar, the mortgage had been foreclosed, the property had been sold, and the foreclosure proceedings had

in all respects been completed. The plaintiff thereafter proceeded under section 20-2142, Comp. St. 1929, which provides that no proceeding shall be had at law for the recovery of the debt secured by the mortgage, or any part thereof, *unless authorized by the court.* It is self-evident that an action at law is separate and distinct from a suit to foreclose a mortgage, and that chapter 41, Laws 1933, amends and repeals sections 20-2141 and 20-2143, Comp. St. 1929, but does not amend, nor purport to amend, section 20-2142; in fact, it left intact all of the provisions of the law with respect to actions at law on notes secured by mortgages. The plain provision of chapter 41 forbids a district court to enter a deficiency judgment in an equity action for the foreclosure of a real estate mortgage.

Section 20-2142, Comp. St. 1929, was section 848 of the Code in 1866 and thereafter. In Laws 1897, chapter 95 was introduced by Senator Beal, amending section 848 of the Code by striking out the last five words, to wit, *"unless authorized by the court,"* but in *Moore v. Neece,* 80 Neb. 600, 114 N. W. 767, filed January 23, 1908, it gave the entire history of chapter 95, Laws 1897, and held that, as the amendments to this Act had not been concurred in by the House in which the measure originated, and as such amendments were not receded from in the House in which they were made, therefore chapter 95 was held to be void, and the original law (Code, sec. 848) was in full force and effect.

In *Meehan v. First Nat. Bank of Fairfield,* 44 Neb. 213, 62 N. W. 490, it was held that it was not the intention of this law to allow two actions for one debt to be prosecuted concurrently, and that the creditor could bring an action in equity upon the mortgage, or could bring an action at law on the note, and that, having elected which means he will adopt, *"he must exhaust the remedy so chosen before resorting to the other."* It was held that an action at law on the note could not be brought during the pendency of, or after judgment in, foreclosure proceedings without leave having been obtained of the court having jurisdiction of the

action of foreclosure, and that such authorization of the court should be alleged by the plaintiff or his action could not be maintained.

When the mortgagee has foreclosed the property, the note is introduced in evidence, and becomes in a sense the property of the court, and the mortgagee must obtain leave of the court to withdraw it for the purpose of bringing suit. Therefore, if the foreclosure proceeding is entirely closed, and the mortgagee applies to the court to withdraw the note, and then is authorized by the court, he may proceed to bring suit on the note for the balance that is justly due and unpaid.

In the case at bar, in section 8 of the petition this application for withdrawal, and authority of the district court to bring suit, reads as follows: "And plaintiff has obtained leave of the District Court of Jefferson County, Nebraska, to withdraw said note from the file in said foreclosure action and to bring this action at law against the defendants for the balance remaining due thereon, with interest and costs." If such allegation had not appeared in the petition, it would be subject to demurrer. *Mann v. Burkland*, 68 Neb. 269, 94 N. W. 116; *Wolff v. Phelps*, 3 Neb. (Unof.) 511, 92 N. W. 143; *Armstrong v. Patterson*, 97 Neb. 229, 149 N. W. 408; *National Fidelity Life Ins. Co. v. Gordon*, 130 Neb. 130, 264 N. W. 155.

Equity jurisdiction ended with the confirmation of the sale and the issuance of the sheriff's deed. Then, when the district court grants the request to withdraw the note, and permits the bringing of an action at law, the court acquires unlimited jurisdiction to grant legal remedy, with no possibility of conflict, which the former statutory limitation was designed to prevent.

Section 14, art. III of the Constitution, provides: "And no law shall be amended unless the new act contain the section or sections as amended and the section or sections so amended shall be repealed."

The purpose of chapter 41, Laws 1933, is to divest district courts of power to enter deficiency judgments in mort-

gage foreclosure actions, and to amend sections 20-2141 and 20-2143, but in this chapter there is no reference, directly or indirectly, to section 20-2142.

The defendants contend that, where instruments are executed at the same time, for the same purpose, and in the course of the same transaction, they are to be construed as one instrument, and that a note and a mortgage securing it, made contemporaneously, are to be construed together as one contract.

In 3 R. C. L. 870, sec. 54, it is said: "But construing together simply means that, if there be any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect as between the parties themselves and all persons charged with notice, so that the intent of the parties may be carried out, and the whole agreement actually made may be effectuated."

Somewhat in point is the case of *Petters v. Storm*, 132 Neb. 542, 272 N. W. 409, which holds that a mortgagor has no right to insist that his liability is wholly discharged because the mortgagee releases the mortgage, unless the security was sufficient to have fully paid the debt. See *Grable v. Beatty*, 56 Neb. 642, 77 N. W. 49.

We have examined all of the assignments of error without finding prejudicial error in the overruling of the demurrer and entry of the judgment by the trial court, and the said judgment is hereby

AFFIRMED.

MESSMORE, J., not participating.

FEDERAL FARM MORTGAGE CORPORATION, APPELLEE, V. JOHN A. FISCHER, APPELLEE: ELIZABETH FISCHER ET AL., APPELLANTS, ARTHUR A. BOHN, INTERVENER, APPELLEE.

290 N. W. 444

FILED FEBRUARY 16, 1940. No. 30647.

1. **Annuities.** The fact that a deed and a contract for an annuity are executed simultaneously will not charge the land with

payment of the annuity, as a reservation, if the contract is not referred to in the deed. Comp. St. 1929, sec. 76-106.

2. ———. In such a case, where there is no reservation, the contract for the annuity, to constitute a charge on the land, must itself contain language effectual to create a lien.

3. **Acknowledgment.** A notary public, who is likewise a stockholder and officer of a corporation, is not disqualified to take the acknowledgment to a mortgage on a homestead merely because the mortgagor intends to use part of the proceeds to pay an indebtedness to the corporation, where the corporation is not a party to the mortgage, either by being named as mortgagee or by having a beneficial interest in its immediate enforcement. *Quesner v. Novotny*, 116 Neb. 84, 215 N. W. 796.

APPEAL from the district court for Madison county: ADOLPH E. WENKE, JUDGE. *Affirmed.*

M. S. McDuffee, for appellants.

Moyer & Moyer, Philip M. Wellman, Franklin L. Pierce, M. B. Foster and *Frederick M. Deutsch, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

JOHNSEN, J.

This is a foreclosure suit. The Federal Farm Mortgage Corporation instituted proceedings on its second mortgage, and Arthur A. Bohn set up his first mortgage by petition in intervention. The trial court decreed foreclosure of both mortgages. Louisa C. Fischer, the mortgagor's mother, who tried to establish a lien on the property, under an annuity agreement, superior to the rights of intervener Bohn, and Elizabeth Fischer, the mortgagor's wife, who sought to claim that the mortgage of intervener Bohn had a void acknowledgment and so was not a homestead lien, have appealed.

Two questions are controlling: (1) Did the annuity agreement existing in favor of Louisa C. Fischer create a charge or lien upon the property? (2) Was intervener's mortgage, on homestead property, acknowledged before a notary public who was disqualified, and so void?

The answer to the first question depends upon the provisions of a quitclaim deed executed by Louisa C. Fischer in favor of her son, defendant John A. Fischer, and of the annuity agreement executed concurrently by Fischer and his wife in favor of the mother. The mother, who was a widow, was a life tenant of the property and the son the remainderman. Prior to the encumbrances here involved, they had joined in executing a mortgage thereon. When this mortgage became due, the banker who had negotiated the loan for Fischer suggested that, in order to facilitate its refinancing or the making of a new loan, the mother ought to execute a conveyance of her life estate to the son. She accordingly executed a quitclaim deed, for "one dollar and other consideration," which did not purport to reserve any rights in the property and which made no reference to any other instrument. The son and his wife at the same time executed an instrument which recited that, as part of the purchase price for the property involved, they agreed "to pay to the said Louisa C. Fischer the sum of two hundred twenty-five dollars on the first day of March, 1931, and two hundred twenty-five dollars each and every six months thereafter during the natural life of the said Louisa C. Fischer." This instrument was acknowledged and was recorded at the same time as the quitclaim deed.

Since a vendor's lien has never been recognized in this state (*Edminster v. Higgins,* 6 Neb. 265), the payments under the annuity agreement would not constitute a lien in favor of defendant Louisa C. Fischer unless some right was reserved by her in the property at the time of the conveyance or unless a separate lien was created by manifest intent and agreement. A provision in a deed of conveyance for the payment of an annuity to the grantor is ordinarily held to constitute a charge or lien upon the land by way of reservation. *Pinkham v. Pinkham,* 60 Neb. 600, 83 N. W. 837; *Bankers Life Ins. Co. v. Ohrt,* 131 Neb. 858, 270 N. W. 497. A reservation will similarly be held to exist where a deed and a contract for an annuity are executed simultaneously as part of the same transaction and the contract is

specifically referred to in the deed so as to constitute a part of it. *Hylton v. Krueger*, 134 Neb. 66, 277 N. W. 792. But where, as here, the deed itself contains no provision for payment of an annuity and no specific reference to the contract by which such an obligation may at the same time have been created, there can be no reservation. Section 76-106, Comp. St. 1929, expressly provides: "Every conveyance of real estate shall pass all the interest of the grantor therein, unless a contrary intent can be reasonably inferred *from the terms used.*" (Italics ours.)

The right of Louisa C. Fischer to a lien in this case depends therefore solely upon the terms of the separate annuity agreement. Since no reservation is involved, the language used in the agreement must be such as would be sufficient in any independent instrument to create a lien on the property. A mere promise in writing to pay an annuity, as part of the consideration for a conveyance, is not enough. An intention to constitute the land as security for the performance of the annuity obligation must clearly appear (3 Tiffany, Real Property (2d ed.) 2748, sec. 661), and where, as here, third party rights are involved, this necessarily can be done only by the use of language effectual to create an actual lien. The annuity agreement in this case contains no such language, and the trial court therefore properly held that it was not a lien on the land.

The remaining question is whether intervener Bohn's mortgage was acknowledged before a disqualified notary public, so as to render it void as a homestead lien. The notary public was F. J. Dankers, who was a stockholder in and cashier of the First National Bank of Madison, Nebraska. Defendants contend that the bank was originally the real mortgagee under Bohn's mortgage, or that it at least had such a direct interest therein as to disqualify Dankers to act as notary public, and that the acknowledgment was accordingly void.

We cannot agree that the bank ever was the actual mortgagee. Ed Fricke, another officer of the bank, who engaged in the mortgage loan business on the side, had placed the

previous loan for the Fischers with a private investor. When it became due, John A. Fischer asked him to endeavor to renew it or to obtain a new loan for him. Fricke suggested that a large enough loan be obtained to pay off his indebtedness to the bank, which was not yet due but upon which the bank had been charging him 10 per cent. interest. Fricke then solicited intervener Bohn to make a loan of $7,500 to Fischer. Bohn agreed to do so, but said he would require a few days to raise the money. On the strength of the commitment, Fricke had the loan papers drawn up and the mortgage recorded. It had been his practice to have all loan papers drawn in his own name and to execute assignments to the lender. Papers were not drawn, however, until he had obtained an outside loan commitment.

The loan papers in this case appear to have been executed on August 30, 1930. Bohn did not have his money available until September 10, 1930. Fricke meanwhile had the mortgage recorded and at the same time prepared and apparently executed an assignment in favor of Bohn. The assignment was not delivered to Bohn, however, or recorded until September 10. As an accommodation to the parties, the bank advanced the $7,500, although the evidence does not indicate whether this was done as a charge against Bohn or Fricke, or how it was carried. In any event, Fischer's testimony shows that he knew the bank was not making the loan to him, nor did he consider that it had any interest in the mortgage. So far as the record indicates, the bank never held the note or mortgage in its possession or ever claimed any rights thereunder. On September 10, Bohn paid the bank the amount of its advance together with interest thereon. The burden rested on defendants to establish that the bank was the actual mortgagee, and the circumstances set out do not sustain the burden of this contention.

Defendants further contend, however, that the bank had a direct interest in the loan transaction, by reason of the fact that it was paid $3,900 out of the proceeds, and that in this situation Danker's interest as a stockholder disquali-

fied him to act as a notary public in taking the mortgage acknowledgment. It appears that, after the $7,500 had been credited to Fischer's account, he drew a check in favor of the bank for $3,900 to apply upon his indebtedness to it.

In *Quesner v. Novotny,* 116 Neb. 84, 215 N. W. 796, it was held that a notary public who is likewise a stockholder and an officer of a corporation is not disqualified from taking the acknowledgment to a homestead mortgage merely because part of the proceeds thereof are to be used to pay an indebtedness owing the corporation, where the latter is not an actual party to the mortgage either as the named mortgagee or as the holder of a beneficial interest therein. There is some logic in the contention that a pecuniary interest in the making of a mortgage ought to be as disqualifying as an interest in the instrument itself or in the enforcement thereof, but it is our duty to adhere to the rule adopted in *Quesner v. Novotny, supra,* since, in a situation such as this, instruments have undoubtedly been drawn in reliance upon the court's previous declarations, including perhaps the mortgage involved in this case.

Defendants cite *Wilson v. Griess,* 64 Neb. 792, 90 N. W. 866, and say that it cannot be distinguished from the present situation. In that case, however, the First National Bank of Sutton, which held a note from another bank for collection, took a mortgage upon the debtor's homestead, naming the other bank as mortgagee but including in its amount some indebtedness which he owed the First National Bank. It was properly held that the First National Bank thus had a beneficial interest in the mortgage itself, and that one of its stockholders and officers was accordingly disqualified from taking the acknowledgment as notary public.

Defendants rely, also, upon *Anderson v. Cusack,* 115 Neb. 643, 214 N. W. 73, but that case similarly is not in point. There a note and homestead mortgage were taken in the name of the president of a bank as collateral security for some indebtedness which the mortgagor owed the bank. The president obviously never had any personal rights in

the mortgage and was simply acting as trustee for the beneficial interests of the bank. In this situation, the acknowledgment, taken by a stockholder of the bank as notary public, indisputably was void.

In the present case, the First National Bank of Madison neither was the named mortgagee nor did it have any interest in the enforcement of the mortgage by virtue of a beneficial interest thereunder.

We have discussed the controlling questions upon their merits and have ignored the procedural hurdles attempted to be raised with respect to our consideration of them. This makes unnecessary the consideration of any of the other questions presented in the briefs.

The trial court properly allowed foreclosure of intervener Bohn's mortgage.

AFFIRMED.

JACOB BRUNTZ V. STATE OF NEBRASKA.
290 N. W. 420

FILED FEBRUARY 16, 1940. No. 30683.

Criminal Law. Conviction set aside because of the violation of section 29-2011, Comp. St. 1929, in the comment of the county attorney to the jury that, "The defendant does not get on the stand to tell you about this case."

ERROR to the district court for Scotts Bluff county: J. LEONARD TEWELL, JUDGE. *Reversed.*

Howarth N. Olsen, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Clarence S. Beck, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, MESSMORE and JOHNSEN, JJ., and CHAPPELL and KROGER, District Judges.

JOHNSEN, J.

Jacob Bruntz was convicted of assault with intent to commit robbery and brings error.

The principal question arises out of the county attorney's comment upon defendant's failure to testify. In his argument to the jury he said: "The defendant does not get on the stand to tell you about this case." The trial court immediately admonished the county attorney and instructed the jury to disregard his remark.

Section 29-2011, Comp. St. 1929, provides that the refusal or neglect of an accused to testify shall not create any presumption against him, "nor shall any reference be made to, nor any comment upon, such neglect or refusal."

An annotation in 84 A. L. R. 795, sets out the decisions generally and summarizes them as follows: "The weight of authority seems to be that comments of the prosecuting attorney on the failure of the defendant to testify in a criminal case, though highly improper, may under some circumstances work no injury, where the trial judge promptly intervenes, excluding the comments and admonishing the jury to disregard them. In other words, comments of that kind stand on very much the same footing as other improper arguments, and whether they call for a reversal or not depends on whether, after a full consideration of all the circumstances, including the action of the trial judge at the time they were made, the appellate court is of opinion that no prejudice resulted."

In 17 C. J. 302, it is said: "It has been held that a conviction will not be reversed for references to defendant's failure to testify where defendant's guilt was conclusively shown."

In *Hardesty v. State*, 95 Neb. 839, 146 N. W. 1007, we held: "On the trial of accused under a criminal charge, misconduct of the county attorney in stating to the jury that 'defendant had an opportunity to go upon the witness-stand himself and deny this charge, but he didn't do it,' does not require a reversal of his conviction on a record showing that no other error was committed; that the trial court disapproved the misconduct by sustaining an objection to the improper remark; that the county attorney thereupon stated he should not have made it; and that accused was not prejudiced thereby."

The opinion states: "While the truth of the accusation against defendant was a question for the jury, the reviewing court can affirmatively say that his guilt was established by evidence so clear and conclusive that he could not have been harmed by the county attorney's misconduct. * * * What is here said is not to be understood as indicating a purpose to depart from the line of decisions upholding the spirit and purpose of the statute. It is apparent that defendant was not prejudiced by the misconduct of which he complains. For the harmless error assigned, the conviction will not be set aside."

It is not our purpose, however, to encourage violations of the statute, nor have we the right to speculate in any case on whether prejudice has resulted from the comment. The only possible aim of such a remark is to thwart the statute. If we treat violations indulgently, we shall soon—in the words of Pope—"first endure, then pity, then embrace." We will apply the rule recognized in *Hardesty v. State, supra,* where the evidence of guilt is so conclusive that all will agree that no other factor could possibly have influenced the result, and not otherwise.

The judgment is reversed and the cause remanded to the district court for a new trial. The other contentions raised by defendant are without merit and do not require discussion.

REVERSED.

IN RE ESTATE OF CARRIE LEE.
OWEN R. TERRY, APPELLEE, V. MAUDE TERRY JOHNSON, APPELLANT.

290 N. W. 437

FILED FEBRUARY 16, 1940. No. 30718.

1. **Courts.** County courts of the state, which are by the Constitution and laws given exclusive original jurisdiction in all matters of probate, settlements of estates of deceased persons, etc., have the power and authority, with respect to the sub-

jects mentioned, to try and determine actions of an equitable character, and grant equitable relief, when proper, to the same extent as a district court regarding other subjects in the exercise of its general equitable jurisdiction.

2. **Contracts.** When in an option agreement it is provided who shall approve the form of its acceptance, and when, within the time therein provided, the optionee makes an acceptance which is insufficient to comply with the terms of the option and sends a copy to the party who is to make approval thereof but who makes no objection thereto until after the time provided in the agreement that the acceptance is to be made, and when, in a reasonable time thereafter and before the optionor has done anything to change her position with reference thereto, in the presence of and with the approval of the party provided in the option to make such approval, an acceptance is made in accordance with the terms of the option whereby the optionee parts with valuable rights and makes a full performance of the agreement on his part, and as a result thereof the optionor receives and accepts all the benefits provided in the option contract, the optionor is, under the equitable doctrine of estoppel, estopped to assert that the acceptance thereof has not been made within the time provided in the agreement and the optionee is entitled to performance thereof.

APPEAL from the district court for Hall county: ERNEST G. KROGER, JUDGE. *Affirmed.*

Frank A. Peterson and *George E. Hager*, for appellant.

B. J. Cunningham, H. G. Wellensiek, W. P. Lauritsen and *Prince & Prince, contra.*

Heard before SIMMONS, C. J., ROSE, PAINE, CARTER and MESSMORE, JJ., and ELLIS and WENKE, District Judges.

WENKE, District Judge.

This is an appeal from the judgment of the district court for Hall county, on an appeal from an order of the county court of Hall county, granting to the appellee, Owen R. Terry, performance of the agreement entered into with the appellant, Maude Terry Johnson.

The facts in this case are as follows: Carrie Lee, a widow and resident of Hall county, died on August 18, 1936, and her will, dated June 24, 1936, was offered for probate by

the Grand Island Trust Company, executor named therein. Objections thereto were filed by Owen R. Terry and Henry G. Terry, nephews, and Harry M. Hollandsworth and Bertha Sprague, all beneficiaries in a prior will of the deceased dated November 7, 1935. After hearing, the will of June 24, 1936, was admitted to probate, and an appeal from the order of allowance thereof was made by the contestants to the district court for Hall county. On August 25, 1937, while said appeal was pending, Maude Terry Johnson, a niece, and a residuary beneficiary of the will of June 24, 1936, entered into an agreement with Owen R. Terry, a nephew and beneficiary of the prior will dated November 7, 1935, in regard to a settlement of the contest, which agreement will be hereinafter more fully referred to. Subsequent thereto, and pursuant to an order of the county court, the appellee filed a claim in the matter of the estate of Carrie Lee in the county court of Hall county on June 7, 1938, based on this agreement, to which the appellant and the executor of the estate filed answers, which claim was approved by the county court, and an appeal thereof taken to the district court. The judgment of the district court was for the appellee and enforced the agreement. This appeal is from the judgment of the district court.

The appellant's first contention is that the county court was without jurisdiction to hear the claim of appellee, for the reasons that the agreement involved the title to real estate, and that it involved more than $1,000, and therefore such action should have been brought in the district court.

This action is for the specific performance of an agreement entered into between the appellee, as beneficiary under the prior will of the testatrix, and the appellant, as an heir at law and a residuary beneficiary under the will offered and allowed for probate, to settle the contest of the latter will, to dismiss the appeal and to have said will finally allowed and approved, and in consideration thereof to provide for the distribution of the share of the residuary beneficiary under this latter will. That such an action for the specific performance thereof is within the general equitable

powers of the county court under the Constitution and statutory provisions granting it exclusive jurisdiction of the settlement of estates of deceased persons, and not within the original jurisdiction of the district court, has been previously determined by this court in the case of *Genau v. Roderick*, 4 Neb. (Unof.) 436, 94 N. W. 523, Pound, C., and approved in the case *In re Estate of Shierman*, 129 Neb. 230, 261 N. W. 155, wherein the court said: "The district court has no original jurisdiction of a suit in equity for specific performance of a contract entered into by the heirs at law and next of kin of a testator, for the purpose of settling a will contest. * * * The Constitution gives the county court 'original jurisdiction in all matters of probate, settlements of estates of deceased persons, appointment of guardians, and settlement of their accounts.' * * * The statutes provide that its original jurisdiction in these matters shall be exclusive. * * * As to such matters, the county court is a court of general jurisdiction. *Lydick v. Chaney*, 64 Neb. 288. It has full and complete equity powers as to all subjects within its exclusive jurisdiction. *Williams v. Miles*, 63 Neb. 859."

The agreement in this suit involves the settlement of a will contest and the distribution of a residuary beneficiary's share and comes within the purview of the statutory and constitutional provisions as to the jurisdiction of the county court, granting it exclusive jurisdiction in the settlement of estates of deceased persons.

It is the further contention of the appellant that the agreement of August 25, 1937, entered into between the appellee and appellant, is, in fact, an option offering to the appellee a one-half interest of the appellant's residuary share of the estate of Carrie Lee, deceased, provided that within ninety days from the date thereof the appellee secure a dismissal of the appeal of the contest of the will dated June 24, 1936, in which appellant is a residuary beneficiary, and that the will be admitted to probate and that the time for appeal pass, and because the dismissal filed November 22, 1937, by the appellee was insufficient to dis-

miss the appeal and time being the essence of the option, the option is automatically withdrawn and therefore the enforcement of the agreement should be denied.

From a careful study of the terms of the agreement and from the conduct of the parties subsequent thereto, as shown by the application for continuance filed October 16, 1937, by the contestants, and by the filing of the dismissal within the ninety days, it is apparent that the parties treated the agreement as an optional offer to be accepted by the appellee within the time therein specified, and the court finds that it was an option agreement. The dismissal of November 22, 1937, filed by the appellee for the purpose of accepting the offer under the provisions of the agreement was insufficient to dismiss the appeal of the contest of the will as to all contestants and therefore not in accordance with the terms of the agreement. Since an acceptance of an option must be strictly in accordance with the terms thereof, the question is whether or not the appellant, or optionor, under the facts herein established, is estopped to claim that the acceptance was not in accordance with the terms of the agreement. The facts disclose that after the time for acceptance of the option and subsequent to the dismissal filed on November 22, 1937, which was within the ninety days provided in the agreement, a copy of which was sent to and received by the attorneys, Prince & Prince, named in the agreement to approve the form of the dismissal, W. A. Prince, a member of that firm, in the fore part of February, 1938, at the opening of a term of the district court for Hall county, objected to Mr. Cunningham, counsel for all the contestants, as to the form of the dismissal being insufficient to dismiss the appeal. In reply thereto, and on February 24, 1938, Mr. Cunningham wrote to Prince & Prince suggesting that, since they were named in the agreement to approve the form of the dismissal of the appeal, they draft a dismissal for that purpose. In reply thereto, and on March 1, 1938, the firm of Prince & Prince wrote to Mr. Cunningham what would be required in order to properly dismiss the appeal, and asking that he give the matter his immediate attention

and advise what his intentions were in reference thereto. On March 8, 1938, in open court, W. A. Prince of the firm of Prince & Prince being present, and demanding an unconditional dismissal so that no question could be subsequently raised that compliance with the contract had not been made, the appeal was dismissed without qualifications as to all of the contestants and the will of June 24, 1936, in which the appellant was a residuary beneficiary, was thereafter admitted to probate in the county court and the time for appeal therefrom has passed, and all the requirements of the acceptance of the optional offer have been complied with. During this time the appellant had done nothing to change her position in regard thereto.

It was provided in appellant's optional offer that the firm of Prince & Prince was to approve the form of dismissal of the appeal, and they, although under no obligation to do so, have acted with reference thereto. The optionee, acting in response to these objections as to the sufficiency of the dismissal, and complying with the requirements of the firm of Prince & Prince as to the form thereof by unconditionally dismissing the appeal in open court as to all contestants, has thereby parted with a right to have a trial of the contest of the will under which the appellant is a residuary beneficiary. This situation has become possible through the provisions of the option agreement making Prince & Prince the parties to approve the form of the acceptance, which responsibility they assumed. Since this provision was part of the option offered by the appellant herein, and this provision being for her protection and benefit, and she having received the benefit thereof, we believe that the doctrine of estoppel should apply.

An estoppel arises from the conduct of a party and may be predicated upon silence or omission as well as upon written words. "Its foundation is justice and good conscience. Its object is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights which might have existed or been enforceable by other rules of the law, unless prevented by the estoppel; and its practical effect is,

from motives of equity and fair dealing, to create and vest opposing rights in the party who obtains the benefit of the estoppel." 2 Pomeroy, Equity Jurisprudence (4th ed.) sec. 802, cited in *Brisbin v. E. L. Oliver Lodge No. 335,* 134 Neb. 517, 279 N. W. 277. "The doctrine of equitable estoppel is frequently applied to transactions in which it is found that it would be unconscionable to permit a person to maintain a position inconsistent with one in which he has acquiesced or of which he has accepted any benefit." 10 R. C. L. 694, sec. 22, cited in *Brisbin v. E. L. Oliver Lodge No. 335, supra.* "The doctrine of equitable estoppel, or estoppel *in pais,* is that a party may be precluded by his acts or conduct from asserting a right to the detriment or prejudice of another party who, entitled to rely on such conduct, has acted upon it." *Draper v. Oswego County Fire Relief Ass'n,* 190 N. Y. 12, 82 N. E. 755. "An estoppel by matter *in pais* may be defined as an express or implied admission become indisputable by reason of the circumstance that the party claiming the benefit of it has, while acting in good faith and in accordance with the real or presumed assent of the other party, been induced by it to change his position. And the parties may have been equally innocent in effecting this change of position or they may not have been equally innocent." *Rea v. Pierson,* 114 Neb. 173, 206 N. W. 760.

When, as in this case, the appellant has in her optional agreement provided for certain counsel to approve the form of the instrument by which the appellee is to accept and perform the option by dismissal of the appeal of the will contest in the district court, and when acceptance thereof is made within the time provided in the option and copy thereof sent to counsel for approval, but when the form of the dismissal is insufficient to dismiss the appeal as to all of the contestants, and when, subsequent thereto, and after the time fixed in the agreement for acceptance, counsel designated in the agreement to approve the form of the dismissal act with reference thereto and object to the sufficiency thereof, and thereafter, before the appellant has done anything to change her position with reference thereto and

within a reasonable time, appellee, in the presence of, by the requirement of and with the approval of such counsel in open court, enters an unqualified dismissal as to all contestants, and as a result the appellee and contestants lose their rights to contest the will and the will is thereafter admitted to probate in the county court and the time for appeal passes and the appellant receives all of the benefits provided for in the agreement, under such facts we think the principle of estoppel applies and the appellant is estopped to assert that acceptance thereof has not been made within the time provided by the agreement, and the appellee is entitled to the performance thereof.

The judgment of the district court is therefore

AFFIRMED.

CHARLES M. CLAYTON ET AL., APPELLANTS, V. DAVID W. EVANS, APPELLEE.

290 N. W. 447

FILED FEBRUARY 23, 1940. No. 30762.

Judgment. After courts, having jurisdiction, have determined issues presented and the time for direct action has expired, litigants who have been indifferent thereto cannot successfully maintain a collateral action to set aside those proceedings so that they can present in the original action issues which could have been raised in the regular course of that litigation.

APPEAL from the district court for Nemaha county: VIRGIL FALLOON, JUDGE. *Affirmed.*

John L. Mattox, for appellants.

Lee Kelligar, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

SIMMONS, C. J.

This is an action to quiet title against a sheriff's deed and to set aside all proceedings had subsequent to the decree in

a foreclosure action. The plaintiffs are husband and wife. The defendant is the grantee in the sheriff's deed.

In 1921 Mr. Clayton became the owner of certain real estate in Nemaha county, which he and his wife later occupied as their homestead. In 1929 the Claytons mortgaged the premises to the Lincoln Trust Company. The Lincoln Trust Company became bankrupt. The First Trust Company became successor-trustee, and as such brought an action in 1934 to foreclose the mortgage. The Claytons filed personally signed answers in the foreclosure action. Other appearances were made later, both personally and by attorney.

Decree of foreclosure was entered in September, 1934. The nine months' statutory stay of the order of sale was had. Further stays were had under the moratorium acts. An order of sale issued July 5, 1935, and the property was sold August 14, 1935, to the First Trust Company. On August 16, 1935, the Claytons by their attorney filed objections to the confirmation of the sale. Confirmation proceedings were delayed by the moratorium stays.

The district court for Lancaster county authorized the First Trust Company to assign the foreclosure decree to Evans. The assignment was made. The court order and the assignment were filed in the foreclosure action. On June 21, 1938, Evans, as the owner of the decree, filed a motion to confirm the sale of August 14, 1935.

June 21, 1938, the court ordered the moratorium set aside, confirmed the sale, ordered the sheriff to deed the property to Evans, and ordered a writ of assistance. Sheriff's deed was issued, delivered to Evans, and by him recorded. There is no showing that the Claytons were represented in the hearing on June 21, 1938. However, by six separate letters from his attorney (the first in December, 1937, the last in May, 1938), Mr. Clayton was advised of the assignment of the decree; that the moratorium law had been declared unconstitutional; that probably all moratoriums would be set aside; that it was necessary to act promptly as court would be sitting and might act upon the moratorium; that his

presence in court was necessary; and that his attorney wanted instructions. No action was taken by Clayton, no attention given to these letters, and no excuse shown for his lack of diligence. On July 20, 1938, the court ordered the moratorium money then on hand paid to Evans.

The Claytons brought this action in October, 1938, alleging that the sheriff's deed is void; that it rests upon an order of the court made in the foreclosure action; that said order is void because Evans was not a party to that action; that the assignment to Evans was invalid because the district court for Lancaster county was without authority to authorize the same, and the First Trust Company was without authority to make the assignment; that the district court was without authority to set aside the moratorium stay; that the plaintiff in the foreclosure action, having accepted the benefits of the moratorium, was estopped to have it set aside; that the order setting aside the moratorium and confirming the sale was made without notice to the Claytons, and that it became final without their knowledge. The Claytons further complain because the court ordered paid to Evans the money which had been paid into court under the moratorium.

Plaintiffs pray that the sheriff's deed be canceled, that defendant be enjoined from asserting ownership to said property, that their title be quieted, and for equitable relief.

Defendant, by answer, pleads the record in the foreclosure and bankruptcy proceedings.

The trial court found generally for the defendant, and dismissed the petition.

Plaintiffs do not cite any statutory provision authorizing a court to grant the relief which they seek, nor do they cite decisions of courts sustaining their cause. The absence of precedents would not bar the granting of the writ. The absence of a showing justifying the decree sought does bar relief. Plaintiffs rely upon the maxim that equity will not suffer a wrong to be without a remedy.

The matters of which they now complain, if grounds for complaint, should have been presented in the original

action. Plaintiffs personally appeared in that action and were represented by competent counsel. Mr. Clayton was repeatedly advised by his counsel that action to complete the foreclosure would be taken, and he did nothing. Mrs. Clayton does not show lack of notice of any of these matters.

The original plaintiffs in the foreclosure action are not parties to this suit, nor are they, or any one interested in the trust being foreclosed, complaining as to what was done. Plaintiffs exercised their rights to prevent the earlier termination of the foreclosure. Plaintiffs were not overreached, and no fraud was practiced upon them.

The assignment of the mortgage to Mr. Evans and the procedure followed thereafter did not create the situation about which plaintiffs complain. Everything that happened in the original action could have and, on the showing here made, would have happened, had the assignment not been made. It was proper for the trial court to permit the action to proceed, after the assignment, in the name of the original party. Comp. St. 1929, sec. 20-322.

After courts, having jurisdiction, have determined issues presented and the time for direct action has expired, litigants who have been indifferent thereto cannot successfully maintain a collateral action to set aside those proceedings so that they can present in the original action issues which could have been raised in the regular course of that litigation. It is a maxim that "Equity aids the vigilant, not those who slumber on their rights."

We find nothing in this record to justify an equity court's granting the relief prayed. The judgment of the trial court is

AFFIRMED.

BAKER STEEL & MACHINERY COMPANY ET AL., V. L. C. FERGUSON ET AL., APPELLEES: WESTERN SURETY COMPANY, APPELLANT.
290 N. W. 449

FILED FEBRUARY 23, 1940. No. 30671.

1. **Judgment.** A stay bond given to obtain a stay of execution as authorized by section 20-1507, Comp. St. 1929, when recorded as provided by section 20-1510, Comp. St. 1929, is a judgment within the purview of the statutes providing for the revivor of dormant judgments.
2. ———: REVIVOR. Under the provisions of section 20-1420, Comp. St. 1929, a proceeding to revive a dormant judgment may be instituted at any time within ten years after it becomes dormant.
3. **Constitutional Law.** A statute which makes a stay bond a judgment against the surety is not inconsistent with the due process clauses of the state and federal Constitutions.
4. **Judgment: REVIVOR.** The only defenses available against an application to revive are that there is no judgment to revive or that the purported judgment is absolutely void, and that the judgment was paid or otherwise discharged.
5. ———: ———. The validity of an assignment of a dormant judgment may not be adjudicated in a proceeding to revive it.

APPEAL from the district court for Douglas county: JOHN A. RINE, JUDGE. *Affirmed.*

Hotz & Hotz, for appellant.

Kennedy, Holland, De Lacy & Svoboda and *Edson Smith, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

CARTER, J.

This is an appeal from an order of the district court for Douglas county, reviving a dormant judgment against the Baker Steel & Machinery Company and the Western Surety Company, the latter company being the signer of a stay bond given to meet the requirements of section 20-1507, Comp. St. 1929, to obtain a nine months' stay of execution.

The Western Surety Company brings the case to this court for review.

The record discloses that on September 28, 1927, one L. C. Ferguson obtained a judgment against the Baker Steel & Machinery Company in the amount of $3,637.79, with interest thereon at 7 *per centum per annum* from October 1, 1927. On October 17, 1927, a stay bond was filed under the provisions of section 20-1507, Comp. St. 1929, in which the Western Surety Company appeared as surety. Five years after the entry of the judgment it became dormant. On July 5, 1933, L. C. Ferguson and Thomas W. Ferguson, as assignee, filed their application for a revivor of the judgment. Service of the conditional order of revivor was had upon the Western Surety Company by the delivery of two certified copies of said order to the director of the department of insurance of the state of Nebraska, and upon the Baker Steel & Machinery Company by delivering a copy to Clifford J. Hotz, president, and by leaving a copy at the last usual place of business of the said corporation in Douglas county. The judgment was revived against the Baker Steel & Machinery Company on August 23, 1933, and kept in force by the issuance of an execution on August 19, 1938. On December 14, 1938, the judgment was revived against the Western Surety Company after innumerable unexplained delays dating from 1933. It is from this order that the appeal was taken.

The primary question involved is whether a stay bond given under the provisions of section 20-1507, Comp. St. 1929, is a judgment within the purview of the statute providing for the revivor of dormant judgments. The stay bond statute provides in part: "The sureties for the stay of execution may be taken and approved by the clerk, and the bond shall be recorded in a book kept for that purpose, and have the force and effect of a judgment confessed from the date thereof against the property of the sureties, and the clerk shall enter and index the same in the proper *judgment docket,* as in the case of *other judgments.*" (Italics ours.) Comp. St. 1929, sec. 20-1510. Another statute provides

that an execution shall issue against the surety upon expiration of the stay. Comp. St. 1929, sec. 20-1513. The question is one of first impression in this state, although there are cases which point to the proper result. In *State v. Fleming*, 21 Neb. 321, 32 N. W. 73, this court pointed out that one of the conditions imposed upon a judgment debtor to obtain a stay was that execution would issue if payment was not made on expiration of the stay. And in *State v. Painter*, 117 Neb. 42, 219 N. W. 794, the court stated that it knew of no authorization for the issuance of an execution except on a judgment.

The argument is advanced that the bond cannot be a judgment for the reason that it is contractual in its nature and contains no statement that it is a judgment or that it may be summarily enforced as a judgment. Appellant overlooks the fact that, as the bond was given with the statute existing which provides that it should have the force of a judgment with the right to an execution, the law entered into the bond and became a part of it just as effectually as if written into the bond. *Johnson v. Chicago & Pacific Elevator Co.*, 119 U. S. 388, 7 S. Ct. 254, 30 L. Ed. 447; *People v. Quigg*, 59 N. Y. 83. The direction in the statute that the stay bond should be indexed "in the proper judgment docket as in the case of other judgments" clearly makes the stay bond a judgment. We therefore hold that the stay bond was a judgment within the purview of sections 20-1515 and 20-1420, Comp. St. 1929, defining dormant judgments and providing for their revivor.

It is urged that the revivor proceeding is barred by the statute of limitations. Under section 20-1420, Comp. St. 1929, a judgment may be revived any time within ten years after it became dormant. Clearly the statute of limitations has no application. *Orchard & Wilhelm Co. v. Sexson*, 119 Neb. 370, 229 N. W. 17.

Appellant contends that the statute making a stay bond a judgment against the surety conflicts with the due process clauses of the state and federal Constitutions. We think this contention is without merit. Due process requires that

there be an opportunity to present any defense that one may have. It has been held, however, that such opportunity need not necessarily be made available before judgment is entered. An appeal on the record which included the bond afforded the required opportunity. The procedure employed was therefore consistent with due process. *American Surety Co. v. Baldwin*, 287 U. S. 156, 53 S. Ct. 98, 77 L. Ed. 231; *United Surety Co. v. American Fruit Co.*, 238 U. S. 140, 35 S. Ct. 828, 59 L. Ed. 1238.

Appellant filed a special appearance in the district court objecting to the jurisdiction of the court on the ground that proper service of the conditional order of revivor was not had. The special appearance was overruled and the alleged error in so doing preserved for our consideration. Service was had pursuant to section 44-207, Comp. St. 1929, providing for service on a foreign corporation by serving duplicate copies of the process on the department of insurance. Appellant admits that it was authorized to transact business in Nebraska prior to December 31, 1929. A judgment against it prior to that date, though dormant, is a liability. This being true, service of process was properly had under the provisions of section 44-207.

Appellant argues that it has been unlawfully deprived of its right to set off certain claims held by the Baker Steel & Machinery Company against L. C. Ferguson. With this we cannot agree. The only defenses available against an application to revive are (1) that there is no judgment to revive or that the purported judgment is absolutely void, and (2) that the judgment was paid or otherwise discharged. Set-off or counterclaim is not a defense to a proceeding to revive a dormant judgment unless there has been an agreement to apply it, in which event it is treated as a payment. *Lashmett v. Prall*, 83 Neb. 732, 120 N. W. 206. The complaint is made that a valid assignment from L. C. Ferguson to Thomas W. Ferguson was not established. Even if this be so, appellant could not assert a counterclaim as a defense. The revivor was properly had upon the joint application of the original judgment creditor and his as-

signee. The validity of the assignment is not an issue as against the judgment debtors. The revivorship proceeding merely recognizes the record and does not adjudicate the validity of the assignment.

We find no prejudicial error in the record.

AFFIRMED.

G. B. LENNOX ET AL., APPELLANTS, V. HOUSING AUTHORITY OF THE CITY OF OMAHA ET AL., APPELLEES.

290 N. W. 451

FILED FEBRUARY 23, 1940. No. 30841.

1. **Constitutional Law.** When constitutional restrictions are not imposed, the legislature may by curative act validate any proceeding which it might have lawfully authorized in the first instance.
2. ———. The legislature cannot by curative act destroy vested rights or impair obligations of contracts.
3. ———. Where a housing authority act passed in 1935 is alleged to contravene constitutional provisions, such allegations are not material where it appears that the legislature in 1937 passed additional supplemental and independent legislation remedying the alleged defects, when it does not appear that a judicial determination of unconstitutionality has intervened, that vested rights were infringed, or the obligations of contracts impaired thereby.
4. **Statutes.** Statutes *pari materia* must be construed together so as to give effect to all, if possible.
5. **Health.** The housing authority acts described in the opinion, providing for slum clearance and low-rent housing for persons of low income by means of assistance of the Federal Housing Authority, constitute a proper exercise of the police power of the state to protect the health, safety, morals and general welfare of its people.
6. ———. The elimination of unsafe and dilapidated tenements by replacement with safe, sanitary, low-rent dwellings is a legitimate object for the exercise of the police power.
7. **Constitutional Law: EMINENT DOMAIN.** Statutes creating housing authorities to operate for slum clearance and construction of dwellings for persons of low income, and granting the housing authority the right of eminent domain for the accomplishment

of such public purpose, are not violative of the due process clauses of the state and federal Constitutions.

8. ———: ———. Neither are such statutes violative of the provisions of the state Constitution prohibiting the taking or damaging of private property for public use without compensation.

9. ———. HEALTH. The housing authority acts do not grant special privileges to those entitled to housing benefits, for the reason that they involve a public purpose from which the entire community will benefit.

10. ———. The granting of administrative discretion is not an unconstitutional delegation of a legislative function, where adequate standards to guide the exercise of such discretion are provided for by the statute authorizing it.

11. ———. The housing authority acts are designed to enable local housing authorities to attain slum clearance and low-rent housing by means of assistance from Federal Housing Authority, and do not delegate legislative functions to the housing authority.

12. ———. The legislature cannot delegate its powers to make a law, but it can make a law to become operative on the happening of a certain contingency or on an ascertainment of a fact upon which the law intends to make its own action depend.

13. **Municipal Corporations.** In eradicating the slum menace the housing authority lightens the burden of the city in protecting all citizens against disease, crime and immorality. Public funds of the city may, with legislative sanction, be used to aid in the establishment of a housing authority, it being a governmental subdivision organized for a public purpose.

14. **Taxation.** Under statutes creating housing authority to operate for slum clearance and construction of dwellings for persons of low income, the housing authority is a governmental subdivision within the purview of the Constitution, and its property and bonds are legally exempted from taxation.

15. **Statutes.** Housing authority acts *held* not to be broader than their respective titles.

16. **Eminent Domain.** The federal government has no power to take or condemn private property for low-rent housing and slum clearance projects, since such purpose is not a public use within the purview of the federal Constitution.

17. **Constitutional Law.** The provisions of section 4, ch. 91, Laws 1937, providing for the conveyance of property to the federal government for slum clearance and low-rent housing projects, are invalid.

18. **Statutes.** When it appears that unconstitutional portions of an act can be separated from the valid portions and the latter enforced independent of the former, and it further appears that

the invalid portions did not constitute such an inducement to the passage of the valid parts that they would not have been passed without them, the former may be rejected and the latter upheld.

19. **Constitutional Law.** Whether statutes relating to slum clearance and construction of dwellings for persons of low income will accomplish object of ridding communities of unsafe and objectionable dwellings is a matter of legislative concern and not for the courts.

20. ———. It is not the function of the courts to pass on the wisdom of legislative action.

APPEAL from the district court for Douglas county: JOHN A. RINE, JUDGE. *Affirmed as modified.*

Kelso A. Morgan and *Burbank & Burbank,* for appellants.

Philip M. Klutznick, Eugene D. O'Sullivan, Harold C. Linahan, W. W. Wenstrand and *Edward Sklenicka, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

CARTER, J.

This is an appeal from a judgment of the district court for Douglas county dismissing plaintiff's petition in which a declaratory judgment as to the constitutionality of chapter 29, Laws 1935, and chapters 91, 92, 93 and 94, Laws 1937, commonly called the housing authority acts, was sought.

This suit was filed by plaintiffs in behalf of themselves and all others similarly situated. One of the plaintiffs is a property owner and taxpayer within the territorial limits of the housing authority project involved herein. The other plaintiffs own property outside the project and are taxpayers in the city of Omaha. The Housing Authority of the city of Omaha, the city of Omaha and their respective officers are made parties defendant. It is alleged that the Housing Authority of the city of Omaha was created under the provisions of chapter 29, Laws 1935, heretofore described, and that all of said act is wholly unconstitutional and void, because (a) it delegates legislative authority to

the governing board of the city and the five persons appointed to constitute the housing authority, contrary to section 1, art. II, and section 1, art. III of the state Constitution; (b) it fails to set up rules, standards and criteria to determine where a project is to be established, thereby resulting in the taking of private property without due process of law in violation of section 3, art. I of the state Constitution, and the Fourteenth Amendment to the Constitution of the United States; (c) that the body of the act is broader than its title, and (d) that the title contains more than one subject, contrary to section 14, art. III, of the state Constitution. For the foregoing reasons it is contended that the act is absolutely null and void. It is then alleged that the legislature at its 1937 session passed chapter 92, Laws 1937, to legalize the creation and establishment of housing authorities in metropolitan cities and to make valid the unconstitutional provisions of chapter 29, Laws 1935. Plaintiff contends that said chapter 92, Laws 1937, has no such validating effect. The petition alleges that a legislative policy was for the first time announced with the enactment of chapters 91, 93 and 94, Laws 1937, wherein the legislature finds that conditions exist in the state which constitute a menace to the health, safety, morals and welfare of its residents and justifies the enactment of the housing authority acts. It is contended that all of said acts delegate legislative authority contrary to constitutional provisions; that all of said acts passed by the 1937 legislature are amendatory of and supplemental to the 1935 act, although they were passed as independent acts; that all of said acts purport to take property for a public purpose to correct an emergent condition, where in fact there is no public purpose and no emergent condition, and that said acts are therefore prohibited by sections 3, 21 and 25, art. I of the state Constitution, and the Fourteenth Amendment to the federal Constitution; and that said acts are class legislation inhibited by section 18, art. III of the state Constitution. It is further contended that section 4, ch. 91, Laws 1937, authorizing the housing authority to sell

property to the federal government, contravenes the due process clauses of the state and federal Constitutions. There is set out in the petition the ordinance passed by the city council of the city of Omaha, creating the housing authority; a copy of an agreement releasing taxes and other charges; a copy of the cooperation agreement between the city of Omaha and the housing authority, the resolution of approval on the part of the city and the authorization of Project No. Nebraska 1-2, involved herein. It is contended that the proceedings set out do not conform to the applicable statutes, and, if they do, that said statutes are violative of sections 3, 16, 21, 24 and 25, art. I; section 1, art II; sections 1, 14 and 18, art. III; sections 1, 2, 4, 6 and 7, art. VIII of the state Constitution, and the Fifth and Fourteenth Amendments to the Constitution of the United States.

Plaintiffs contend that chapter 29, Laws 1935, is unconstitutional for the reasons hereinbefore set out, and that the attempt of the legislature to validate the acts performed thereunder by the enactment of chapter 92, Laws 1937, is ineffective for any purpose. The aforesaid validating act says: "The creation and establishment of housing authorities under the provisions of chapter 29, Session Laws of Nebraska, 1935, and any amendments thereto, together with all proceedings, acts and things undertaken, performed or done with reference thereto, are hereby validated, ratified, confirmed, approved and declared legal in all respects," etc. Plaintiffs contend that a statute purporting to validate, ratify and confirm an act will not correct a constitutional defect in an act previously passed. We do not feel that it is necessary to pass upon that point in connection with the matter presently before us for the reason that the legislature did not attempt to validate the prior statute but undertook merely to validate all proceedings taken under the former act. The validating act was general and not special legislation. Neither is it shown that any vested rights have been destroyed or any obligation of contracts impaired. New housing authority statutes were enacted governing the future conduct of the corporations therein created. We

think the general rule is that the legislature may validate irregular or unauthorized acts of quasi municipal and public corporations which it lawfully could have authorized originally, or which are defective as to matters with which it could have dispensed, and that it may cure the invalid creation of such bodies. 16 C. J. S. 879, sec. 428. The housing authority acts passed by the 1937 legislature were all approved on May 18, 1937, and became effective on the same date. They should therefore be considered together. All proceedings and undertakings performed with reference to chapter 29, Laws 1935, are therefore properly validated, providing the legislature had the power to authorize said proceedings in the first instance.

We are convinced that chapters 91, 92, 93 and 94, Laws 1937, are independent acts, complete in themselves. This being true, they may change, modify or repeal prior enactments without violating section 14, art. III of the Constitution, relating to amendments. *Hinman v. Temple*, 133 Neb. 268, 274 N. W. 605; *State v. Lehmkuhl*, 127 Neb. 812, 257 N. W. 229. It is true that sections 6, 9 and 12, ch. 29, Laws 1935, were repealed by section 19, ch. 94, Laws 1937, and the title to the act, as well as the act itself, so states. It is also true that sections 6 and 12, ch. 29, Laws 1935, were actually rewritten in the form of an amendment in chapter 94, Laws 1937, but the title of the act and the act itself met constitutional requirements in this respect.

It is alleged that necessary constitutional requirements were not met in the adoption of chapter 29, Laws 1935. The fact remains, however, that said act is presumed to be constitutional. There has been no judicial determination of invalidity. In 1937, chapter 94, Laws 1937, was enacted and it is contended that it supplies any defects that may have existed in the former law. The legislature also enacted chapters 91, 92 and 93, Laws 1937, having to do with housing authorities in cities of the metropolitan class. In a test of the legality of the creation, organization, operations and purposes of the housing authority of the city of Omaha, we necessarily conclude that chapter 29, Laws 1935, and

chapters 91, 92, 93 and 94, Laws 1937, must be construed together. All parts of chapter 29, Laws 1935, which have been repealed are clearly noted. All changes in the form of amendments are clearly specified. In addition thereto it is provided by chapter 94, Laws 1937, that, in case of any possible inconsistencies, it shall control over any previous act. The result is that the 1937 acts validate all actions done under the 1935 law, supply requirements allegedly necessary to sustain the corporate existence and functions of the housing authority of the city of Omaha and grants new and independent powers by enacting new provisions into the law. We know of no reason why an earlier law, neither repealed by the legislature nor invalidated by the courts and presumed to be constitutional, should not be considered in connection with subsequent independent acts, in determining whether constitutional requirements have been met in effecting the purposes of the legislature. *Pierson v. Faulkner,* 134 Neb. 865, 279 N. W. 813; *Dornan v. Philadelphia Housing Authority,* 331 Pa. St. 209, 200 Atl. 834; *Krause v. Peoria Housing Authority,* 370 Ill. 356, 19 N. E. (2d) 193.

In the Illinois case last cited it appears that the legislature passed a housing authority act in 1934 which did not prescribe adequate standards in the delegation of duties to the state housing board provided for by the act contrary to constitutional requirements. The legislature in 1937 attempted to remedy the defects by amendment and the supreme court of Illinois held that such amendment effectually corrected the defects of the former act. *Krause v. Peoria Housing Authority,* 370 Ill. 356, 19 N. E. (2d) 193. We think the same result must obtain where the remedy is enacted by a supplemental and independent statute.

Plaintiffs contend for the rule announced in *Central Nat. Bank v. Sutherland,* 113 Neb. 126, 202 N. W. 428, wherein the court said: "If a legislative act when enacted is violative of the provisions of our Constitution, it cannot subsequently become a valid law merely because the reason for its invalidity has been removed, without being subsequently reenacted

by the legislature." This is undoubtedly the rule where the subject of the proposed legislation was at the time prohibited by the Constitution. But if the subject of the legislation be permitted by the Constitution, and the claims of unconstitutionality are directed toward the form and sufficiency of the act, we doubt not that such irregularities may be supplied by subsequent legislation where obligations of contracts and accrued vested rights are not thereby impaired and there has been no intervening adjudication of unconstitutionality.

In determining the validity of the housing acts, we will therefore treat chapter 29, Laws 1935, and chapters 91, 92, 93 and 94, Laws 1937, as being *pari materia*. The constitutionality of chapter 29, Laws 1935, can be properly considered only if chapter 94, Laws 1937, be treated as supplemental to it, and in effect an integral part of it. The question of constitutionality will therefore be considered with this view of the situation in mind.

Plaintiffs contend that the legislation before us was not enacted for a public purpose. In enacting the legislation, the legislature made certain findings to the effect that conditions existed relative to slum clearance and low income housing which required the establishment of sanitary and wholesome housing projects in cities of the metropolitan class with a view of promoting health and sanitation and preventing the spread of crime and disease. The findings of the legislature, while not absolutely controlling, are entitled to great weight. It is obvious that the legislation was passed in the exercise of the police power of the state to protect the health, safety, morals and general welfare of its people. We think that these objectives subserve a public purpose and as such are proper subjects for legislative action. Many states have enacted similar laws and we are impressed with the unanimity with which they have been upheld as being for a public purpose. *Dornan v. Philadelphia Housing Authority*, 331 Pa. St. 209, 200 Atl. 834; *Rutherford v. City of Great Falls*, 107 Mont. 512, 86 Pac. (2d) 656; *Marvin v. Housing Authority of Jacksonville*, 133

Fla. 590, 183 So. 145; *Housing Authority of County of Los Angeles v. Dockweiler*, 94 Pac. (2d) (Cal.) 794. The legislation being for a public purpose, the legislature may properly grant the right of eminent domain to housing authorities without constitutional violation, assuming, of course, that just compensation will be made to owners of property taken or damaged. *Rutherford v. City of Great Falls*, 107 Mont. 512, 86 Pac. (2d) 656; *Matter of New York City Housing Authority v. Muller*, 270 N. Y. 333, 1 N. E. (2d) 153; *Romano v. Housing Authority of the City of Newark*, 123 N. J. Law, 428, 10 Atl. (2d) 181; *Allydonn Realty Corporation v. Holyoke Housing Authority*, 23 N. E. (2d) (Mass.) 665.

The contention is advanced that the legislation delegates legislative powers to the city council of the city of Omaha and to the Housing Authority of the city of Omaha, contrary to section 1, art. II, and section 1, art. III of the Nebraska Constitution. The part of the legislation to which plaintiffs specifically refer is that part of section 3, ch. 29, Laws 1935, which says in part: "When it has been determined by the governing body of any metropolitan city, by ordinance in the exercise of its discretion, that it is expedient to create a housing authority, the mayor of such city, with the approval of the governing body of the city shall appoint five persons who shall constitute the housing authority." This does not delegate legislative authority to the governing body of the city. It merely provides the contingency upon the happening of which the enacted legislation becomes operative. Under many statutes, the future contingent event upon which the operation of the law depends is the favorable result of a popular election. The providing of such contingencies upon which the law might properly be limited to take effect does not constitute a delegation of legislative power. The applicable rule is: The legislature cannot delegate its powers to make a law, but it can make a law to become operative on the happening of a certain contingency or on an ascertainment of a fact upon which the law intends to make its own action depend. *State*

v. Frear, 142 Wis. 320, 125 N. W. 961; *State v. Sullivan*, 67 Minn. 379, 69 N. W. 1094; *Edwards v. Housing Authority of City of Muncie*, 19 N. E. (2d) (Ind.) 741; *Housing Authority of County of Los Angeles v. Dockweiler*, 94 Pac. (2d) (Cal.) 794.

It is also contended that subdivisions (b) and (c) of section 5, ch. 29, Laws 1935, constitute a delegation of legislative powers to the housing authority. Subdivision (b) provides in substance that the housing authority shall have power to determine what areas are unsanitary or substandard, and to prepare plans for projects in such areas; to acquire property for the development and to hold title thereto; to construct such project and to operate the property and establish rent schedules; and to perform many other designated acts in furthering the construction and operation of such projects.

It must be borne in mind that it is for the legislature to determine what the law shall be; to create rights, duties and powers, and provide the general mode of conduct to be followed. This does not mean that the legislature must lay down a strict rule which must be followed by an administrative officer or board, but that such persons or boards may be vested by the legislature within reasonable limits with the exercise of judgment in carrying out the expressed legislative purpose of the act. To ascertain and determine whether a certain area is unsanitary and substandard within the meaning of the act is an administrative function. The other functions prescribed in subdivision (b) are likewise rights, duties and powers properly delegated to the housing authority as the administrative agency. It cannot be seriously disputed that the legislature is clothed with power to delegate to administrative boards and agencies of the state the power of ascertaining the facts upon which the laws are to be applied and enforced. It may also authorize the doing of specific acts necessary to the furtherance of the purposes of the act. Such delegations of power and authorizations of acts do not transcend constitutional inhibitions so long as the law-making power is wholly reserved to the legislature

and no part thereof has been delegated to any other governmental subdivision, board or agency. *State v. Howard,* 96 Neb. 278, 147 N. W. 689; *Wells v. Housing Authority,* 213 N. Car. 744, 197 S. E. 693; *Dornan v. Philadelphia Housing Authority,* 331 Pa. St. 209, 200 Atl. 834; *Knoxville Housing Authority v. City of Knoxville,* 174 Tenn. 76, 123 S. W. (2d) 1085; *Chapman v. Huntington, W. Va., Housing Authority,* 3 S. E. (2d) (W. Va.) 502.

Plaintiffs contend that subdivision (c) of section 5, ch. 29, Laws 1935, constitutes an unlawful delegation of legislative power. This subdivision states: "To do all things necessary or convenient to carry out the powers expressly given in this act." We fail to see where this subdivision adds anything to the act in so far as a determination of constitutionality is concerned. The powers therein alleged to be delegated are limited to powers expressly granted which we hold to be administrative in character.

It is contended that chapter 29, Laws 1935, fails completely to make any legislative finding of convenience and necessity. However, chapters 91, 93 and 94, Laws 1937, found that certain harmful conditions exist. A remedy for these harmful conditions is provided. The determination of facts to ascertain whether a given locality contains the harmful conditions for which the housing authority acts were passed to rectify, does not constitute a delegation of legislative power.

To specifically discuss all of the alleged unlawful delegations of legislative authority would unduly extend this opinion. Suffice it to say that the housing authority acts involved herein have been carefully examined and we are convinced that constitutional requirements in that respect have not been transgressed.

Plaintiffs argue that the housing authority acts and the cooperation agreement contained in the record will result in the taking of their property, and that of others similarly situated, without due process of law, contrary to section 3, art. I of the Nebraska Constitution and the Fourteenth Amendment to the Constitution of the United States. The

argument on this point is based on the contention that there is no provision for a determination by a competent tribunal as to whether or not the creation of the district and the construction of the improvement will promote public health, convenience and welfare. The claim is made that the housing authority arbitrarily fixes the location and boundaries of the project, and the city council of the city approves or disapproves the caprice indulged in. In our opinion, the use of granted powers was properly hedged in by the act. The powers granted were specifically limited to the express purpose of "making provision for the preservation of the public health, safety, morals and welfare by facilitating sanitary housing conditions for families of low income and the elimination of congested and unsanitary housing conditions within the limits of the city creating it." Laws 1935, ch. 29, sec. 5. Any arbitrary action under the act would necessarily subject such action to the injunctive processes of the courts. The right of eminent domain is subject to approval by the city council before it can be exercised, and if attempted to be used in the furtherance of arbitrary action the injunctive process against such action would destroy the foundation for the exercise of that right. If the powers granted are lawfully exercised, the right of eminent domain, accompanied by full compensation for property taken or damaged, does not violate the due process clauses of the state and federal Constitutions.

The plaintiffs who are taxpayers in the city of Omaha living outside of the territorial boundaries of the housing authority project have no rights abridged which the state and federal Constitutions guarantee to them. In the first place, the housing authority has no power to tax or in any way to create any debt or charge against the city. The taxpayers of the city of Omaha as such are not affected. The act does provide, however, that a city may make donations to a housing authority and that the housing authority shall make reimbursements for all such loans made. Laws 1937, ch. 91, sec. 6. The exercise of this power would naturally increase the tax burden of all taxpayers of the

city. If a tax is for a public purpose, as distinguished from a private purpose, it will be upheld by the courts and will not amount to the taking of private property without due process of law. We think the well-settled rule is that the taking of property under the power of taxation properly exercised does not constitute a taking without due process of law. *De Pauw University v. Brunk*, 53 Fed. (2d) 647; *McLeland v. Marshall County*, 199 Ia. 1232, 201 N. W. 401. In eradicating the slum menace, the housing authority lightens the burden of the city in protecting all citizens against crime, disease and immorality. Public funds of the city may, with legislative sanction, be used to aid in the establishment of a housing authority, it being a governmental subdivision organized for a public purpose. *Spahn v. Stewart*, 268 Ky. 97, 103 S. W. (2d) 651; *State v. Housing Authority of New Orleans*, 190 La. 710, 182 So. 725; *Williamson v. Housing Authority of Augusta*, 186 Ga. 673, 199 S. E. 43. Consequently, we conclude that neither a property owner within the territorial boundaries of a housing authority project nor a taxpayer of the city of Omaha living outside the project may successfully claim a violation of the due process clauses of the state and federal Constitutions. *Williamson v. Housing Authority of Augusta*, 186 Ga. 673, 199 S. E. 43; *Rutherford v. City of Great Falls*, 107 Mont. 512, 86 Pac. (2d) 656.

Plaintiffs insist that the legislation is special rather than general and therefore inhibited by section 18, art. III of the state Constitution. We do not deem it necessary to cite authority for the statement that the legislation has general application to all cities of the metropolitan class and that it has none of the aspects of special legislation.

It is urged that chapter 93, Laws 1937, providing that the bonds and property of a housing authority shall be exempt from all taxes and special assesssments violates sections 1, 2, 4 and 6, art. VIII of the state Constitution. The aforesaid provisions relate to raising revenue upon uniform property valuations, exemptions of property from taxation, the prohibition against the remission of taxes,

and the right of municipalities to make improvements and levy special assessments therefor. We are obliged to hold that a housing authority, created and operated under the legislation before us, is a governmental subdivision within the purview of the Constitution, and consequently its property and bonds are legally exempted from taxation. *Fontenelle Forest Ass'n v. Sarpy County,* 118 Neb. 725, 226 N. W. 327; *Herman v. City of Omaha,* 75 Neb. 489, 106 N. W. 593. In cases involving similar statutes in other jurisdictions, the right to exempt the property and bonds of a housing authority from taxation has uniformly been upheld. *Marvin v. Housing Authority of Jacksonville,* 133 Fla. 590, 183 So. 145; *Williamson v. Housing Authority of Augusta,* 186 Ga. 673, 199 S. E. 43; *Housing Authority of County of Los Angeles v. Dockweiler,* 94 Pac. (2d) (Cal.) 794.

Plaintiffs allege that the respective enactments before the court are broader than their titles and therefore contravene section 14, art. III of the state Constitution, providing that no bill shall contain more than one subject and the same shall be clearly expressed in its title. We have examined the titles to the acts before us, and it appears clear to us that the matters contained in the acts themselves are germane to the purposes of the acts expressed in their titles. The constitutional provision does not require that the title be a synopsis of the law. The purpose of the constitutional inhibition was to prevent surreptitious legislation by advising legislators of the nature of the measures they are called upon to support or oppose. If by a fair and reasonable construction the title calls attention to the subject-matter of the bill, it may be said that the object is expressed in the title. We think the titles to the acts before us meet constitutional requirements. *State v. Price,* 127 Neb. 132, 254 N. W. 889; *Spier v. Thomas,* 131 Neb. 579, 269 N. W. 61; *Elliott v. Willie,* 112 Neb. 78, 198 N. W. 861.

It is urged that the proceedings taken in furthering the purposes of the housing authority project herein involved do not conform to the requirements of the applicable statute.

We have examined the ordinance passed by the city council of the city of Omaha creating the housing authority, the agreement releasing taxes and other charges, the cooperation agreement between the housing authority and the city of Omaha, and the resolution of approval on the part of the city and the authorization of the project involved herein. We hold that the ordinance and resolution meet all statutory requirements and that each of the agreements mentioned are legal and binding obligations authorized by the housing authority statutes. We further hold that any bonds or debentures issued by the housing authority of the city of Omaha will be the debts or obligations of the housing authority of the city of Omaha, and not a debt or obligation of the city of Omaha, the county of Douglas, or the state of Nebraska.

Plaintiffs also urge that the provision of section 4, ch. 91, Laws 1937, providing that "any state public body may upon such terms, with or without consideration, as it may determine: (a) Dedicate, sell, convey or lease any of its property to a housing authority *or the Federal Government,*" is violative of the due process clauses of the state and federal Constitutions. We think this is true in so far as the inclusion of the federal government is concerned. It has been held that the federal government has no power to condemn private property for low-cost housing and slum clearance projects, for the reason that it is not for a public use prescribed by the delegated powers of the federal government. *United States v. Certain Lands in City of Louisville,* 78 Fed. (2d) 684. The federal government cannot therefore properly take or own property for the purposes of providing slum clearance or low income housing. But we do not think that the inclusion of the federal government in this provision was such an inducement to the passage of the act that it would not have otherwise been enacted. When it appears that unconstitutional portions of an act can be separated from the valid portions and the latter enforced independent of the former, and it further appears that the invalid portions did not constitute such an inducement to the

passage of the valid parts that they would not have been passed without them, the former may be rejected and the latter upheld. *Nelsen v. Tilley, ante,* p. 327, 289 N. W. 388. We think the foregoing rule controls the instant case.

In applying the applicable rule that all reasonable doubt must be resolved in favor of constitutionality, we conclude that the legislation is constitutional except in the one respect noted. This being true, the legislature had the power in the first instance to authorize the acts which were validated by chapter 92, Laws 1937. Consequently, the Housing Authority of the city of Omaha was lawfully created by virtue of this curative legislation.

Much is said in the briefs about the wisdom of this legislation, a subject with which we cannot concern ourselves. The wisdom of legislation is a matter for legislative and not judicial decision.

JUDGMENT ACCORDINGLY.

JOHNSEN, J., concurring specially.

I am in accord with the court's decision, except that I do not believe that we can or should attempt to determine in this case the power of the federal government in housing matters, as expressed in the sixteenth and seventeenth syllabus points. The opinion admits that, irrespective of the extent of such power, the rest of the statute is in any event constitutional, and this, it seems to me, is as far as it is necessary or possible for us to go.

The following clarification of the foregoing opinion was filed March 26, 1940.

CARTER, J.

Appellees by motion request a clarification of our former opinion in this case (*Lennox v. Housing Authority of City of Omaha, ante,* p. 582, 290 N. W. 451). It is urged that our holding in the former opinion to the effect that the federal government has no power to take and condemn private property for low-rent housing and slum clearance projects casts doubt on the power of the Housing Authority of the city of Omaha to secure bonds issued by it to the federal gov-

ernment, or an authorized governmental agency of the federal government, by a pledge of its revenues or a mortgage of any housing project, projects or other property of the authority. We do not think that our former opinion imports any such conclusion, but for the purpose of removing any doubts on the subject we desire to amplify our previous holding.

We think it is within the power of the legislature to authorize a housing authority to borrow money and secure the loan by a pledge of revenues or a mortgage of any housing project, projects or other property of the authority to any one desiring to make the loan, including the federal government or any authorized governmental agency of the federal government. And in case of default in the payment of such loans, we take the view that the federal government, or any governmental agency of the federal government empowered to make such loans, would have the same redress in the courts in the enforcement of payment as any person or private corporation would have under like circumstances.

The declaration of unconstitutionality contained in our former opinion is limited to that part of section 4, ch. 91, Laws 1937, specifically described therein, and in no event is it to be construed as affecting any other section of the questioned statutes.

B. L. FALLIS, APPELLANT, V. W. E. VOGEL, APPELLEE.
290 N. W. 461

FILED FEBRUARY 23, 1940. No. 30842.

1. **Workmen's Compensation.** A claimant for compensation under section 48-121, Comp. St. 1929, as amended by section 41, ch. 57, Laws 1935, who, through an injury, has suffered a permanent partial loss of the use or function of the left hand and left leg, is entitled to recover such proportion of the compensation allowed for total disability, under subdivision 1 of said section, as the extent of his loss would bear to the total loss of such members.
2. ———. In a cause arising under the workmen's compensation law, where the trial court found the employee to be temporarily

totally disabled for a period of 67 weeks, compensation to be allowed the employee is fixed by subdivision 1, sec. 48-121, Comp. St. 1929, as amended by section 41, ch. 57, Laws 1935; and where temporary total disability is followed by permanent partial disability, and the same is determined at the end of the 67th week and fixed to the extent of 25 per cent. of the ability of the employee to carry on his former occupation, such employee should receive 25 per cent. of 66⅔ per cent. of the weekly wage, received at the time of the injury, for the remaining 233 weeks and in no event beyond the period of 300 weeks, and thereafter 25 per cent. of 45 per cent. of such weekly wage for the remainder of his natural life, in accordance with subdivision 3 of said section 48-121, as amended, and with subdivision 1 of the same act.

3. ———. Section 48-174, Comp. St. Supp. 1937, providing for appeals from the district court to the supreme court in compensation cases, contains no specific provision or language as to the time for filing a bill of exceptions in the supreme court. Under such circumstances, this section of the statute contemplates the application of the general law relating to bills of exceptions for the purpose of appeal from the district court to the supreme court in compensation cases.

APPEAL from the district court for Hall county: ERNEST G. KROGER, JUDGE. *Affirmed.*

Lloyd W. Kelly and *B. J. Cunningham,* for appellant.

William H. Carns and *Hall, Cline & Williams, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

This is a proceeding under the workmen's compensation law. Plaintiff, a man 63 years of age, engaged in the occupation of a general painter for 38 years, while employed by the defendant, on September 21, 1936, in the painting of a ceiling, fell from a scaffold a distance of 14 feet onto some nail kegs, then to the cement floor, severely injuring him.

On April 20, 1938, plaintiff instituted suit in the Nebraska workmen's compensation court, setting forth his claim for disability. May 3, 1938, defendant answered,

alleging payment of compensation for total permanent disability for 67 weeks at $15 a week; alleged that the plaintiff's permanent disability consisted of 25 per cent. loss of the use of the left hand and 25 per cent. loss of the use of the left leg. November 7, 1938, an award was made by the judge who heard the compensation case, awarding compensation to the plaintiff in the sum of $15 a week for 300 weeks; $10 a week for the remainder of plaintiff's life, based on injuries to two members, sustaining 100 per cent. disability of the left leg and 100 per cent. disability of the left hand. Rehearing was waived by defendant in the compensation court, and an appeal taken to the district court for Hall county, where the case was heard *de novo*.

That the plaintiff was injured in the course of his employment and that his wages amounted to $31.20 a week is not in dispute. The plaintiff was paid $15 a week compensation for 67 weeks, totaling $1,005, and in addition thereto compensation in the sum of $5.20 a week for permanent partial disability for 68 weeks, and also $1,210.55 for necessary medical, surgical and hospital expenses.

The trial court fixed plaintiff's disability as permanent partial loss of the use of the left arm and permanent partial loss of the use of the left leg at 25 per cent.; found that such permanent partial disability was ascertainable from January 3, 1938; that plaintiff was entitled to compensation at the rate of $15 a week for temporary total disability for a period of 67 weeks, for which he had been paid, and in addition thereto the sum of $5.20 a week for the remaining 233 weeks, but not beyond 300 weeks, and that he had been paid such amount for 68 weeks; further found that after the 300-week period plaintiff was entitled to compensation in the sum of $3.51 a week for and during his lifetime, and, in addition, entered an order for the payment of all necessary medical, surgical and hospital expenses; found that any amounts paid by the defendant to the plaintiff are to be taken into consideration and credited to defendant. Without reference to the temporary total disability, as heretofore stated, the trial court, basing the

recovery due plaintiff and considering the permanent partial disability of two members as 25 per cent., figured 25 per cent. of 66 2/3 per cent. of the agreed weekly wage of the plaintiff ($31.20), amounting to $5.20 a week, and for the permanent partial disability of 25 per cent. for the loss of the use of two members, in figuring the plaintiff's compensation for life and after the 300-week period, as aforesaid, took 25 per cent. of 45 per cent. of the weekly wage of plaintiff ($31.20), amounting to $3.51. From this finding and judgment the plaintiff appealed.

Plaintiff's injuries consisted of severe shock, comminuted fracture of the left humerus near the shoulder, comminuted compound fracture of the lower left ulna and radius involving the joint, longitudinal fracture of the middle phalanx of the fourth finger on the left hand, fractures of the transverse processes of the third and fourth lumbar vertebræ, separation and slight displacement of the symphysis pubis, blood in the urine and injury to the kidney, laceration of the right heel, and bruises of the left scapula and coccyx. Plaintiff remained in the hosiptal for a period of 110 days, began to walk at time of leaving and has continued to walk.

The medical experts, with the possible exception of the attending physician, fixed the disability to plaintiff's left hand, the loss of use thereof, and the loss of use of the left leg at 25 per cent. and considered his ability to carry on his work as a painter. They agreed that he could not climb ladders, or work from scaffolding, or paint in corners, due to lack of muscular power in two fingers on his left hand which he cannot close. Dr. J. W. Martin estimated plaintiff's disability at 25 per cent., based on limitations of motion in the arm and leg, and testified that he also took into consideration plaintiff's ability to do useful labor. He examined him 12 different times between April 6, 1937, and April 21, 1939, and also examined X-rays taken by Dr. Johnson.

Dr. R. W. Fouts testified to the same degree of disability as the other medical experts. As to the ability of the plain-

tiff to carry on his work as a general painter, the doctor testified: "Oh, I think there is some of the work of a painter that he couldn't do at all even if he never had had an injury. I think there is some work of painting that he could do more than 75 per cent. of to take into consideration all of it; it would be around there somewhere I do know; it is an estimate, but certainly it is more than 50 per cent. as a painter doing general work, I believe." The attending physician testified that 25 per cent. would be the extent of the plaintiff's disability in his left hand and left leg, with the exception of carrying on his occupation, in which case his disability measured 100 per cent.

Several witnesses, contract painters acquainted with plaintiff's ability as a painter, testified that he was a good mechanic and knew his business; that they would hesitate to employ him because he was not physically sound and would be unable to climb ladders, work from a scaffold, or hold a paint pail in his left hand while painting with his right; further, that a painter uses his left hand from 20 to 40 per cent. of the time while painting, and that plaintiff would be unable to do this. It was also testified that he would be able to do some kinds of painting at reduced wages.

Plaintiff testified that as a result of the accident his left leg is weak; that he can walk about 10 blocks when his leg gives out; that he uses a cane in walking; otherwise he would fall; that for this reason he is unable to do the usual work of an outside painter. He testified that two fingers on his left hand cannot be closed by their own muscular power, but can be pushed and closed by his other hand or by some external force; that one finger is broken and cannot be moved or bent at all and is partially paralyzed. He made a complete recovery involving the fractures of the left upper extremities, and the two fractured vertebræ had healed perfectly, but there remain some persistent muscle atrophy and some associated weakness of the leg. The stiffness of which plaintiff complains is his inability to stoop and rise without the use of a cane and, as contributing to his general inability to perform his work as a painter,

was not caused, according to the expert medical testimony, by this accident, but was caused by generative hypertrophic osteo-arthritis of the spine, common to people of his age. The foregoing constitutes the substance of the evidence necessary to a determination of this case.

The section of the workmen's compensation law here involved is section 48-121, Comp. St. 1929, as amended by section 41, ch. 57, Laws 1935, and subdivisions 1 and 3 thereof.

This court in *Frost v. United States Fidelity & Guaranty Co.*, 109 Neb. 161, 166, 190 N. W. 208, in fixing compensation where two members were injured, resulting in a permanent partial disability to each member, said that it was specifically provided for by the statute (Comp. St. 1922, sec. 3044, now Comp. St. 1929, sec. 48-121), "that in all cases involving a *permanent* and *partial* loss of the use or function of any of the members mentioned the compensation shall be in such proportion to the amounts named in subdivision 3 as the loss of the use of the member bears to a total loss." This rule was followed in *Schlesselman v. Travelers Ins. Co.*, 112 Neb. 332, 199 N. W. 498; *Johnson v. David Cole Creamery Co.*, 109 Neb. 707, 192 N. W. 127; *Ashton v. Blue River Power Co.*, 117 Neb. 661, 222 N. W. 42; *Radford v. Smith Bros.*, 123 Neb. 13, 241 N. W. 753. In the *Ashton* case this court stated the reasoning in *Frost v. United States Fidelity & Guaranty Co., supra,* "is not only in accord with the literal terms employed by the legislators, but fairly expressive of the true legislative intent evidenced by this act."

In *Radford v. Smith Bros., supra,* the rule was again announced as in the preceding cases. That was a case involving disability to more than two members. The opinion analyzed section 48-121, Comp. St. 1929, subdivisions 1 and 3 thereof. Therefore, under the provisions of said section 48-121, a claimant for compensation, who has sustained an injury, for the loss of the use of the left hand and for the loss of the use of the left leg, is entitled to recover such proportion of the compensation allowed for total disability, under subdivision 1 of said section, as the extent of the

loss of the use of two members will bear to the total loss of such members.

The defendant contends that the bill of exceptions was not filed in time, and that the judgment of the district court must therefore be affirmed, because the pleadings are sufficient to support the judgment. That part of section 48-174, Comp. St. Supp. 1937, pertinent as referred to by the defendant follows: "Any appeal from the judgment of the district court shall be prosecuted in accordance with the general laws of the state regulating appeals in actions at law except that such appeal shall be perfected within thirty days from the entry of judgment by the district court."

The judgment in the instant case was entered in the district court for Hall county June 9, 1939; motion for a new trial was overruled September 22, 1939; the transcript for appeal was filed in the supreme court October 21, 1939; the bill of exceptions was filed in the supreme court November 16, 1939, 55 days from the date of the overruling of the motion for a new trial. Defendant states that to comply with section 48-174, Comp. St. Supp. 1937, the plaintiff was under obligation to perfect his appeal within 30 days from the entry of the judgment of the district court, or the overruling of the motion for a new trial; that the bill of exceptions was, in fact, filed out of time and that it constituted an integral part of the proceedings necessary to perfect the appeal; citing *Scott v. Dohrse,* 130 Neb. 847, 266 N. W. 709, which holds chapter 57, Laws 1935 (the compensation law) to be a complete and independent act, and citing other cases of like holding.

When the transcript is filed in the supreme court, the appeal is perfected. There is no limitation on the filing of the bill of exceptions except under the general rule. Section 48-174, Comp. St. Supp. 1937, contains no specific provision as to the time for filing a bill of exceptions on appeal from the district court to the supreme court. Under such circumstances, this section of the statute contemplates the application of general laws with reference to bills of exceptions for the purpose of appeal from the district court

to the supreme court in compensation cases. Defendant's contention in this respect is not well taken.

For the reasons given in this opinion, the judgment of the district court is

AFFIRMED.

IVEL W. MILLER, APPELLEE, V. CLAUDE C. JONES, APPELLANT.
290 N. W. 467

FILED MARCH 1, 1940. No. 30731.

1. **Pleading.** Where an action is founded upon an instrument for the unconditional payment of money only, the petition is sufficient if it contains the elements set out in section 20-837, Comp. St. 1929.
2. ———. An instrument, based upon a business transaction, wherein A states, "I owe B $1,300," contains an implied valid and legally sufficient consideration and promise to pay, and is an unconditional admission of an existing debt which obligates A to pay B the stated amount.

APPEAL from the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

Waring & Waring, for appellant.

Sloans, Keenan & Corbitt, contra.

Heard before SIMMONS, C. J., ROSE, PAINE, CARTER, MESSMORE and JOHNSEN, JJ., and ELLIS, District Judge.

SIMMONS, C. J.

Plaintiff owned a bakery at Fort Morgan, Colorado. In the spring of 1928, he sold the bakery to the defendant. There was no written contract. Full payment of the purchase price was not made. On December 5, 1933, defendant owed the plaintiff $1,300. On that date, defendant "wrote" the following on the back of an envelope and "handed" it to the plaintiff: "Dec. 5. 1933. This is to certify that I, Claude C. Jones, owe I. W. Miller Thirteen Hundred Dollars

($1,300) Claude C. Jones." Defendant has paid no part of said sum.

Plaintiff's amended petition herein contained the usual caption, the names of the parties, and the following:

"Comes now plaintiff herein and for cause of action against the defendant alleges as follows:

"1. That on or about the 5th day of December, 1933, the defendant promised for a good and valuable consideration to pay, in writing, to the plaintiff the sum of $1,300.00; said instrument being in words and figures as follows:" (The instrument above set out is copied verbatim.)

2. (Alleges the residence of the parties.)

"3. That due demand has been made upon the defendant to pay said $1,300, with interest, and that the defendant has failed, neglected and refused to pay the same.

"4. That there is due from the defendant to the plaintiff the total sum of $1,611.00."

The petition concluded with a prayer for judgment for $1,611, interest and costs.

The defendant demurred to the amended petition for the reason "that the same fails to state facts sufficient to constitute a cause of action" against him. This demurrer was overruled.

Defendant by objection and by motion in effect renewed this demurrer at the close of plaintiff's opening statement, at the offering of evidence by the plaintiff, and at the conclusion of plaintiff's case. Said demurrers, objections, and motions were overruled. Defendant states: "The theory (of the demurrer) was that the instrument sued on was not a promissory note and that it does not therefore import a consideration, and that the consideration must be alleged in the petition."

The defendant answered, preserved his demurrer, and denied the allegations of the petition.

Plaintiff testified to the facts recited in the opening paragraph of this opinion, to all of which defendant made repeated and timely objections, presenting the same reasons urged in the demurrer, and finally moved to strike the testimony for the same reason.

Defendant offered no evidence. Plaintiff moved for an instructed verdict, which was sustained, and judgment was entered. Defendant's motion for a new trial was overruled. Defendant appealing assigns as error the overruling of his demurrers to the petition and to the evidence; the admission of evidence of the original contract over objection; and the direction of a verdict for the plaintiff. These assignments then go to the sufficiency of the petition to state a cause of action and the competency and sufficiency of the evidence to sustain a judgment.

Defendant's first contention is that the instrument sued on is not a negotiable instrument. Plaintiff admits that contention; hence, it will not be discussed.

Defendant's next contention is that, in an action based upon a nonnegotiable instrument, the consideration must be alleged and proved. This calls for a construction of the statute with reference to pleadings, and a construction of the instrument.

"In an action, * * * founded upon an account, promissory note, bill of exchange, or other instrument for the unconditional payment of money only, it shall be sufficient for the party to give a copy of the account or instrument, * * * *and to state that there is due to him* on such account or instrument, from the adverse party, a specified sum, which he claims with interest." Comp. St. 1929, sec. 20-837.

It is evident that the legislature contemplated that the requirements of a pleading, applicable to accounts, promissory notes, and bills of exchange, shall apply to other instruments for the unconditional payment of money only. This court in construing this section of the statutes has said: "It is to be observed that this section deals with an action founded upon an account or upon some instrument for the unconditional payment of money only; and in such an action the pleading is declared to be sufficient if the pleader gives a copy of the account or instrument, with all credits and indorsements thereon, and states that there is due him on such account or instrument, from the adverse party, a specified sum, which he claims with interest."

First Nat. Bank of Chadron v. Engelbercht, 57 Neb. 270, 77 N. W. 685.

Wyoming has a statute in the main in the identical language of section 20-837, Comp. St. 1929. Presented with a similar problem of construction, that court held: " * * * where the instrument upon which the action, counterclaim, or set-off is founded is one for the unconditional payment of money only, whether negotiable or not, it is unnecessary, in the short form of pleading authorized by section 4406, to aver consideration for the promise or order." *Brown v. Cow Creek Sheep Co.*, 21 Wyo. 1, 126 Pac. 886. See, also, 8 C. J. 858; 10 C. J. S. 1186, sec. 565; 8 Am. Jur. 560, sec. 948; 4 Bancroft's Code Pleading, 3592, sec. 2065; *Prindle v. Caruthers*, 15 N. Y. 425; *Scott v. Esterbrooks*, 6 S. Dak. 253, 60 N. W. 850.

It follows that the petition herein is sufficient if the instrument set out falls within the statutory classification of an instrument for the unconditional payment of money only. That the instrument is unconditional and refers to money only need not be demonstrated.

We are called upon, not to name the instrument, but to determine its legal effect. Instruments, similar to the one here involved, have been variously held to be acknowledgments of debt, due bills, results of an account stated, and nonnegotiable promissory notes, from which a promise to pay and a valid consideration may be legally implied.

" * * * to be an instrument for the payment of money, it must be an instrument which acknowledges an absolute obligation to pay, not conditional or contingent; one, the execution of which being admitted, it would be incumbent on the plaintiff, in an action to enforce it, only to offer the instrument in evidence to entitle him to a recovery. In other words, an instrument that admits an existing debt." *Trepagnier & Bros. v. Rose*, 18 App. Div. 393, 46 N. Y. Supp. 397.

In *Shimel v. Williams*, 136 Misc. 464, 240 N. Y. Supp. 161, the instrument was an "I. O. U." It was held: "An express promise to pay is not necessary; an implied promise

arising from the existence of the debt is sufficient. * * * Accordingly, the legal presumption of a consideration which obtains with respect to negotiable notes does not attach to the instrument here. But none the less does the evidence of a consideration appear within the note as clearly as if it were expressed to have been given for 'value received' * * * for the instrument here is not merely the expression of a promise; it is the declaration of a debt. As such it constitutes an admission of every element which is necessary to create a valid debt, including a consideration. A promise there may be indeed without a consideration, but a debt without a consideration is a contradiction in terms."

In a note to his executors, a testator said: "You will pay Philip E. Gallagher five hundred ($500.00) dollars. I owe him that." It was held: "The words, 'I owe him that,' imply a debt, and there can be no debt in a legal sense without a consideration to support it. Both a debt and a consideration are implied in the words quoted." *Matter of Gallagher v. Brewster,* 153 N. Y. 364, 47 N. E. 450.

This court has said: "A debtor is one who owes." *McArthur v. Clarke Drug Co.,* 48 Neb. 899, 67 N. W. 861.

"Used in a business sense in correspondence or contracts between business men dealing with one another, the word (owing) naturally implies a legal obligation." *In re Bresler's Estate,* 155 Mich. 567, 119 N. W. 1104.

"To say that one owes a debt means simply that he is obliged or bound to pay." *McDuffie v. Lynchburg Shoe Co.,* 178 Ala. 268, 59 So. 567.

Debt has been defined as "that which one person is bound to pay to another." 17 C. J. 1373. "Ordinarily the term imports a duty or obligation to pay, for the enforcement of which an action will lie." 17 C. J. 1376.

The word "due" is often used in business transactions as synonymous with "owing" or "remaining unpaid." *Fowler v. Hoffman,* 31 Mich. 215. See annotation Ann. Cases, 1918 E, pages 760-772.

Likewise, the word "due" has often been construed as being synonymous with the word "payable." See Ann.

Cases, 1918 E, page 769. See, also, 19 C. J. 819, 822.

See, also, 8 C. J. 116; 19 C. J. 823; 10 C. J. S. 522, sec. 84; 7 Am. Jur. 847; 1 Daniel, Negotiable Instruments (7th ed.) secs. 36 and 37; *Gay v. Rooke*, 151 Mass. 115, 23 N. E. 835; *Beeching v. Westbrook*, 8 Mees. & Wels. (Eng.) *411; *Smith v. Ice Delivery Co.*, 8 Ga. App. 767, 70 S. E. 195; *Long v. Straus*, 107 Ind. 94, 6 N. E. 123; *Currier v. Lockwood*, 40 Conn. 349; *Hopson v. Brunwankel*, 24 Tex. 607; *Cummings v. Freeman*, 2 Humph. (Tenn.) 143; *Lincoln v. Butler*, 14 Gray (Mass.) 129; *Jacquin v. Warren*, 40 Ill. 459; *Brady v. Chandler*, 31 Mo. 28; *Brewer v. Brewer*, 7 Ga. 584.

"An I. O. U. professes to be the result of an account stated between the parties, and an acknowledgment from the maker that he owes the person to whom he gives it so much money." *Lemear v. Elliott*, 4 L. T. Rep. n. s. 304.

This court has held: "The rendering of an account between parties and agreeing upon the amount due as appearing therefrom will support an action for the balance thereby shown without an express promise to pay." *Hendrix v. Kirkpatrick*, 48 Neb. 670, 67 N. W. 759. "An account stated implies a promise by the debtor to pay the agreed amount of debt owing to the creditor." *In re Estate of Black*, 125 Neb. 75, 249 N. W. 84. See 1 C. J. 699.

The consideration is the settling of the account. 1 C. J. 698; 1 C. J. S. 714, sec. 34.

The law permits a suit on the written instrument, without pleading and proving the original items of indebtedness. *In re Estate of Black, supra; O'Neal v. Patterson*, 206 S. W. (Mo. App.) 596; *Shearer v. Shearer*, 84 Colo. 234, 269 Pac. 19; 1 C. J. 707.

"A promissory note, duebill, or I O U, being an admission of a certain sum due, is *prima facie* evidence of account stated." 1 C. J. 690. See 1 C. J. S. 714, sec. 34.

We conclude that the instrument in suit is an unconditional admission of an existing debt for money only which the defendant is obligated to pay to the plaintiff, and that there is implied in it a valid and legally sufficient consideration and a promise to pay. It follows that it is an "instrument

for the unconditional payment of money only," and that the several demurrers were properly overruled.

Defendant's next contention is that the evidence is insufficient to sustain a recovery. The evidence has been recited herein. It followed the complaint and conformed to it. The defendant made no attempt to deny those facts. The testimony warrants the finding and judgment. No prejudicial error is found.

The judgment of the trial court is

AFFIRMED.

CHARLES E. PEARSE ET AL., TRUSTEES, ET AL., APPELLEES, V. LOUP RIVER PUBLIC POWER DISTRICT, APPELLANT.
290 N. W. 474

FILED MARCH 1, 1940. No. 30734.

1. **Trial.** Instruction offered on measure of damages, and refused, is set out at length. It correctly states the law, but every principle therein was covered by the trial court in its three long instructions on measure of damages, and there was therefore no error in rejecting the tendered instruction.
2. **Eminent Domain.** There is merit in giving short, definite instructions to the jury, but elaboration at some length can be overlooked in an instruction dealing with the measure of damages, and seeking to clarify this subject for the jury.
3. **Appeal.** If the amount of the verdict is supported by some competent evidence, then it cannot be said to have been arrived at by the jury through passion and prejudice, and the verdict cannot be set aside on that ground, but a remittitur can be ordered when the clear preponderance of the evidence shows the verdict to be excessive.
4. **Remittitur.** From a verdict and judgment for $1,883, it is directed that a remittitur be filed to reduce the judgment to $1,200.

APPEAL from the district court for Madison county: ADOLPH E. WENKE, JUDGE. *Affirmed on condition.*

August Wagner, C. N. McElfresh and *Webb Rice*, for appellant.

Moyer & Moyer and *Mapes & Mapes, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

PAINE, J.

This is an appeal by the Loup River Public Power District from judgment on a verdict against it for $1,883 for a right of way and perpetual easement for an electric power transmission line across a farm of 240 acres.

The Public Power District, hereafter called the condemner, began proceedings in the county court for Madison county to acquire a right of way by condemnation under the power of eminent domain. Appraisers were appointed, who returned an award of $750, from which award the condemner appealed to the district court on the ground the award was excessive.

A stipulation was entered into between the parties that damages in the future to growing crops would be paid if and when they arose, and were not to be compensated for in these proceedings.

In the trial in the district court the plaintiff proceeded on the theory that the award was wholly inadequate.

The evidence discloses that the 240-acre farm lies 4½ miles east of the city of Madison, and that every acre is tillable. It is fenced and cross-fenced, and the buildings consist of a large modern house, a horse barn for 25 head of horses, a cattle barn, hog sheds, feed lots, silo, granaries, chicken house, farrowing pens, grain elevator, with a capacity of 5,000 to 6,000 bushels, hollow tile corncrib with a capacity of 4,500 to 5,000 bushels of corn, a complete water system throughout the yards and feed lots. The farm is adapted to raising and feeding live stock, and the land, of loess soil, is best for raising corn, alfalfa, and small grain. Because of a scientific plan for rotation of crops, pursued for years, the yield is above the average, as the farm has in the past produced crops of 60 bushels of corn per acre, 80 to 90 bushels of oats, and unusually fine crops of alfalfa. A graveled road connects the farm with Madison, and it is considered one of the best farms in the county. Many wit-

nesses testified that this farm was worth $90 to $100 an acre, and the condemner in his brief admits that $85 an acre is a fair valuation.

The transmission line crosses the farm on a straight north and south line close to the east side of the farm, and consists of three cables suspended from cross-arms supported by two poles. These poles are 50 feet long, set seven feet in the ground, and are creosoted, and the life of the poles is from 30 to 40 years. Each of the six supporting structures across this farm are the same. Two poles are set 14 feet six inches apart, and the east pole of each of the six pairs is set from 12 to 15 feet inside the east boundary line fence of the farm, and the poles are X-braced to give them strength and resistance to high winds. Each of the three electric cables, or conductors, are made with a core of seven strands of steel galvanized wire, around which are wound a number of strands of aluminum wire, which carries the current. The life of a conductor of that sort is indefinite. Similar conductors after having been in service for 20 years show no evidence of deterioration.

D. J. DeBoer, chief electrical engineer of the condemner, testified that he did not know of a single case where this kind and size of a cable was broken, but if a break should occur the line would be de-energized the instant that the cable hit the ground, as automatic circuit breakers immediately take the line out of service the instant it hits the ground, that is, the line would be absolutely dead in a little over one-tenth of a second.

The lowest point which the cables hang to the earth at 60 degrees F. is 28 feet in four of the spans, 29 feet in another, and 35 in another; the distance to the ground would be reduced about six inches for each ten degrees rise of temperature as the cables expand. These clearances equal or exceed those required by the National Safety Code when a power line goes over highways. The weight of the cables is one-half pound per foot, or from 275 to 300 pounds per span.

This power line is designed to carry from 69,000 to

115,000 volts of electricity. Electricity of this voltage will arc or jump from this uninsulated cable to another well-grounded object a distance of between five and six inches. These lines are patrolled or inspected by men on foot, and it is testified that a major repair, such as replacing a cross-arm or pole, which would require going upon the farm property with a repair truck, would not be required more often than once every 15 years. Each pole is equipped with a ground wire extending from the top of the pole to the ground to carry off lightning, but there is no danger in coming in contact with the poles, or with these ground wires, except during a lightning storm. There is a large steel tower in this line one mile north of this farm which affords added protection from lightning, and it is testified that the presence of these six structures on this farm tends to reduce danger from lightning strokes to live stock and fences. The residence and farm buildings are located from 400 to 500 feet from the transmission line.

Several witnesses for the condemner testified that the market value of the farm would not be decreased more than $150 to $200, and a county supervisor from Platte county testified that he had two such transmission lines across his farm, that he had personally farmed around such structures for a period of nine years, and that the diminution of market value by reason of the building of the transmission line would not in his opinion exceed $15 to $20 for each structure.

Robert Fulton, an electrical engineer, of Lincoln, was the expert called by the plaintiff. He was 51 years of age, a graduate of the college of engineering of the University of Nebraska, has been consulting engineer in the installation of many municipal electric systems in the state, and from 1934 to 1937 was chief electrical engineer for the Platte Valley Public Power & Irrigation District, and since that time has been in the employ of several electrical districts. He testified that he is familiar with the transmission line extending from near Columbus to Norfolk, Nebraska; that it is insulated for 69,000 volts, and all of the balance of

the construction is suited for 115,000 volts; that any person would be safe within 15 feet of the wires, and that a person thoroughly familiar with such transmission lines could approach much closer without danger; that it is dangerous for an ordinary person to approach nearer than 15 feet to the actual conductor, therefore a farmer should not start a stack of hay within 50 feet of such conductors; that in working on haymaking tools, binders, or combines, where the clearance is 27 feet, he would be in danger if standing on the top of a combine which would put him 17 or 18 feet in the air. Another danger mentioned was that children should not fly kites near these conductors.

A number of farmers were called by the plaintiff, who testified as to the increased difficulty in farming the land. One testified that grain could not be cut along the fence line between the posts and the fence with an eight-foot binder; that in checkrowing corn one would have to cut the wire north and south and resplice it 12 times in the field where the poles stand; that the weeds would grow up around the poles, and that these could not be mowed with a tractor or horse-mower, but would have to be mowed by hand, and that it would be necessary to cut these weeds at least three times during the crop season.

Another responsible farmer, who had been county commissioner of Madison county for 12 years, testified there would be difficulty in farming the narrow strip of land between the pole lines and the fence in cutting grain, in discing, and in harrowing, and that the presence of this power line would make a difference to him of $15 an acre on the entire farm, or damage the farm $3,600.

The evidence of one real estate agent was that the power line decreased the value of the entire farm from $5 to $10 an acre, and another that it decreased it from $12.50 to $15 an acre.

This is perhaps an inadequate abridgement of the several hundred pages of evidence in the bill of exceptions, but gives the great variance of the testimony before the jury, which ran from a damage of $12 to $15 a structure for the

six structures up to the same amount per acre for the entire farm, and on this evidence the jury returned a verdict of $1,883.

The condemner sets out 18 assignments of error for the reversal of this judgment, charging that the verdict is excessive, that the jury entirely disregarded the important fact that the transmission line is limited to about three acres of land along the edge of the east line of the appellee's farm, and in no manner interferes with the use of the remaining 237 acres, or casts any burden thereon, and that the testimony of competent witnesses that the market value of the remainder of the tract was in no manner decreased was entirely disregarded by the jury.

Objection is made to the receipt of certain evidence, over the objections of condemner, about children flying kites, and stacking hay near the line. Condemner also objects to the giving of instructions Nos. 9, 11 and 12.

The condemner offered just one instruction, which was refused by the trial court, reading as follows: "In assessing plaintiffs' damages, you will allow them such damages as you find from a preponderance of the evidence they have sustained in depreciation, if any, of the fair market value of their farm. Such depreciation is to be measured by the difference in the fair market value of the farm immediately before the construction of the transmission line thereon and immediately thereafter. Your finding must be based upon the evidence and not upon conjecture. In weighing the evidence relating to such depreciation you may consider every element of annoyance, disadvantage, and danger resulting from the improvement, which would influence an intending purchaser's estimate of the market value of the farm, if any such are proved by the evidence, but you are not at liberty to consider speculative, imaginary, or fanciful disadvantages, or consequences which the owners themselves might avoid by the exercise of reasonable care. Nor are we here concerned with damages that possibly may arise in the future from negligence of the District in the construction or maintenance of its line, as such damages would

be recoverable by the party injured in a separate action, if and when they arise, and you will not consider such speculative damages in making up your verdict in this case. All damages to which plaintiffs are entitled in this action are measured by the depreciation in the fair market value of their land, and resulting from the proper construction and maintenance of the improvement. When you have so assessed their damages, you will have allowed them full compensation in this case."

It is argued rightly that it is error to refuse a proffered instruction which is warranted by the evidence and correctly states the law of the case, unless the principles involved are covered by other instructions. *Hyndshaw v. Mills,* 108 Neb. 250, 187 N. W. 780; *First Nat. Bank v. Carson,* 30 Neb. 104, 46 N. W. 276.

An examination of the instructions given by the trial court discloses that the subject of the measure of damages was covered by the court's three instructions Nos. 10, 11 and 12; that these three instructions were, as claimed by condemner, three times as long as the one instruction above set out. However, each element set out in the above instruction was covered by the court's three instructions, and some of the principles were simplified and others were amplified so that the jury would clearly understand each principle of law.

There is undoubtedly merit, as a rule, in giving short instructions, but if any elaboration is to be allowed in the charge to the jury it would be overlooked in the instructions dealing with the measure of damages to be allowed, for this subject is often troublesome to the members of a jury while deliberating.

We can admit that the instruction tendered is a fair and concise statement of the law on the measure of damages, and yet hold that the trial court covered the subject completely, and with perhaps greater clarity. We conclude that the court's charge to the jury was correct, and did not tend to confuse the jury.

In the brief of the condemner, it is set out that three

projects in Nebraska are being federally financed by the Public Works Administration, designed to eventually produce 500,000,000 K. W. H. of electric current annually, and "to get this power to the farms and to make it available for industries, it must be sent out to Norfolk, Scottsbluff, Hastings, Grand Island, Kearney, Beatrice, South Sioux City, to Lincoln and Omaha, and to a hundred other communities in the commonwealth. It is necessary to construct transmission lines to do this. These transmission lines must cross farm lands. If unreasonable, exorbitant and excessive allowances must be made for right of way easements, the success of the entire development which includes irrigation for thousands of acres of productive lands may be aborted. Costs of the projects have already greatly overrun estimates. * * * This is not to suggest that to speed our material development, private property should be taken without just compensation. But is to suggest that proper regard should be had for the obverse side of the shield, to the end that public funds be not taken for private remuneration except upon full value received."

The plaintiffs' farmer witnesses, as well as reliable real estate agents, have testified that the land was worth from $5 to $15 an acre less upon the whole tract than it was before the line was built. In *Dunlap v. Loup River Public Power District*, 136 Neb. 11, 284 N. W. 742, 124 A. L. R. 400, this court said it was proper to consider the reasonable market value of a farm before and after such power line is built across it, and, if an owner cannot sell his farm at as good a figure with this line across it as before, that this was proper to consider. See *Kentucky Hydro-Electric Co. v. Woodard*, 216 Ky. 618, 287 S. W. 985; *Kentucky Hydro-Electric Co. v. Reister*, 216 Ky. 303, 287 S. W. 357; annotation, 49 A. L. R. 697; *Lilienthal v. Platte Valley Public Power and Irrigation District*, 134 Neb. 281, 278 N. W. 492; *Asche v. Loup River Public Power District*, 136 Neb. 601, 287 N. W. 64; annotation, 124 A. L. R. 407.

There is no question but what it will be difficult for repair trucks to get through the cultivated fields to this line.

The plaintiff testified that there was only one gate which gave access to the fields, and from that, one would go north through the yard, around the residence, and to a lane east of the feed lots, and turn east across the fields to that line.

So far as the amount of the verdict returned in this case by the jury is concerned, it cannot be set aside and disregarded as being arrived at through passion and prejudice, for the verdict is well within the testimony returned by several of the witnesses.

However, in the opinion of the court, the verdict is much too high, for the plaintiffs retain all of their land except the few square feet of ground occupied by the 12 poles making up the six structures. They may cultivate their land as before, so far as these 12 poles do not interfere. There will be abundant room for alfalfa stacks, even if none can be placed within 50 feet of these three transmission lines. If there is difficulty in planting checkrowed corn along this narrow strip of land along the east fence occupied by these six structures, perhaps other crops can be planted on this ground with much less annoyance and trouble.

The rule of this court has been that, on appeal in an action for damages, a judgment on a verdict which the clear preponderance of the evidence shows to be excessive may be reversed unless appellee files a remittitur for the excess. *Corr v. City of Omaha,* 122 Neb. 323, 240 N. W. 312, in which a remittitur was ordered of $3,000.

In *Nutter v. Standard Land Co.,* 100 Neb. 548, 160 N. W. 948, the jury rendered a verdict of over $16,806.79, and a remittitur was ordered of all above $6,600. In *Sternberger v. Sanitary District,* 100 Neb. 449, 160 N. W. 740, the jury returned a verdict of $1,585.15, and it was directed that all of the judgment above $500 should be remitted.

In *Wiles v. Department of Public Works,* 120 Neb. 689, 234 N. W. 918, a verdict returned in the amount of $9,000 was affirmed after a remittitur was filed in the amount of $3,000. In *McGinley v. Platte Valley Public Power and Irrigation District,* 133 Neb. 420, 275 N. W. 593, a verdict and judgment of $23,813.70 was by remittitur reduced to

$17,000 without the expense of another trial. See full discussion of the subject of remittitur and additur in 13 Neb. Law Bulletin, 416.

In the light of the actual facts, and these former decisions of our court, it is the opinion of the court that the sum of $1,200 would be sufficient to cover all the damages to this farm in running this power line directly down the east boundary fence of this farm, and not angling across the farm, as happens in many cases.

The court is not substituting its judgment for that of the jury, and is not depriving the plaintiffs of another jury trial. We are simply indicating that, if a verdict had been rendered in the sum of $1,200, it would probably have met the approval of this court. The plaintiffs have the alternative of a reversal, with another trial to a jury, together with the expense and time involved therein, or they may file the remittitur suggested, and have the judgment stand affirmed. The decision as to which course will be taken must be made by the plaintiffs, and not by this court.

If the plaintiffs will file a remittitur within 30 days, reducing this judgment to $1,200, the judgment of the lower court will be affirmed, as thus modified, otherwise the judgment will stand reversed and remanded for a new trial.

AFFIRMED ON CONDITION.

CARTER, J., dissenting.

The plaintiff is entitled to recover for the depreciation of the general market value of his land resulting from the construction of the transmission line. This damage may include any reasonable fears arising from the construction of the power line that would depreciate its general market value. But such fears should be limited to dangers known and reckoned with by purchasers and vendors of real estate generally. Without such a foundation the evidence is not properly admitted for the jury's consideration. To permit the owner to testify to his personal fears, largely speculative and conjectural, without showing that the dangers upon which they were based were of such general knowledge as to affect the market value of the land is, in my

opinion, clearly erroneous. Also, the calling of electrical engineers as witnesses who recite dangers never heard of by the purchasing public, and therefore not affecting the general market value of the land, is likewise improper. A noted text-writer states the rule as follows: "Damages alleged to flow from the taking of part of a tract are not allowed if they can have no effect upon present market value. * * * Damage to remaining land from unfounded fears is not recoverable." 2 Nichols, Eminent Domain (2d ed.) 736.

In *Illinois Power & Light Corporation v. Cooper*, 322 Ill. 11, 152 N. E. 491, the court in discussing the question before us said: "Electricity is an element of great potential danger, in the control and use of which great care is necessary, and it may be that persons having no actual knowledge of the practical operation and effect of such lines heavily charged with electricity may fear the dangers which they imagine exist because of the location of the line on the property in question. If this is so, and by reason of such fear the persons affected are not willing to buy the lands on which the line is constructed, the law cannot regard the depreciation created by such a cause as resting upon any substantial basis and cannot allow any compensation on account of any claimed depreciation which is due to mere fear founded in reality upon lack of knowledge and not justified by the facts." The majority opinion cites *Kentucky Hydro-Electric Co. v. Woodard*, 216 Ky. 618, 287 S. W. 985, in support of its opinion. This case adopts the rule applied in *Alabama Power Co. v. Keystone Lime Co.*, 191 Ala. 58, 67 So. 833, as follows: "While, therefore, it is the intent of the law that all the actual damages which may naturally and proximately result to the remainder of a man's tract of land by reason of the condemnation of a right of way for a public purpose across it shall be paid to him, the law will not permit mere speculative elements of damages, based upon an ill-defined fear that at some unknown and indefinite time in the future some misfortune may come to some man or beast by reason of such improvement, to enter into the

consideration of those who, under the law, are required to fix the amount of the damages." Also, in *Kentucky Hydro-Electric Co. v. Reister*, 216 Ky. 303, 287 S. W. 357, cited by the writer of the majority opinion, the court followed the *Woodard* case and added: "The evidence in this case was, to a large extent, the opinions of witnesses who gave but few facts upon which these opinions were based. Necessarily the extravagance and groundlessness of these opinions is reflected in the verdict." It is noteworthy that both of these cases upon which the court relies were reversed and remanded *for a new trial.* And in *Yagel v. Kansas Gas & Electric Co.*, 131 Kan. 267, 291 Pac. 768, the Kansas court in a very exhaustive discussion of the subject of fear as an element of damage in a condemnation for an electric power line said: "Where a right of way for the erection or maintenance of towers and wires for the transmission of electricity is condemned, the owner may recover compensation for the actual damages arising from depreciation in the value of his remaining land, caused by the presence of these things upon the right of way; but the possible fears of prospective purchasers from their presence upon the right of way cannot be made a basis on which to predicate such depreciation or affect the amount of the recovery."

I submit that this court ought to establish a fair and dispassionate rule as to the competency of evidence on the question of fear in this type of case. To permit any and all persons to testify without foundation to speculative, conjectural, groundless and mythical dangers tends to create an orgy of fear that proper instructions cannot cure and which inevitably results in unconscionable verdicts. The difficulty arises from an unrestrained and indiscriminate admission of prejudicial evidence rather than from any errors in the instructing of the jury. In my judgment, the case should be reversed and remanded for a new trial in which the evidence of fear should be limited to those reasonable fears that affect the general market value of farm lands.

Another error, as grievous as the first, is contained in the court's opinion. I refer to the requirement that a remittitur of $683 be filed in lieu of a retrial. It has long been the rule in this state that, where a verdict of a jury is clearly against the weight and reasonableness of the evidence, it will be set aside and a new trial granted. *Bentley v. Hoagland,* 94 Neb. 442, 143 N. W. 465; *Stewart v. City of Lincoln,* 114 Neb. 362, 207 N. W. 511. I agree that, where the jury has made an error the extent of which the court can with some certainty ascertain, a remittitur is a proper remedy. *McKay, Munger & Wentz v. Hinman,* 13 Neb. 33, 12 N. W. 15; *Trester v. Pike,* 60 Neb. 510, 83 N. W. 676; *Ord Hardware Co. v. J. I. Case Threshing Machine Co.,* 83 Neb. 353, 119 N. W. 682; *Braun, Ray Bros. & Finley Co. v. Roberts Construction Co.,* 122 Neb. 182, 239 N. W. 924. But if there is no method by which the court can rationally ascertain the extent of the excess, a remittitur cannot be required. *Babbitt v. Union P. R. Co.,* 78 Neb. 410, 110 N. W. 1014. Under such circumstances a remittitur is nothing more than a substitution of the judgment of the court for that of the jury. The presumption is that an excessive verdict is the result of any prejudicial error that appears in the record. A remittitur therefore cannot properly be required in any case where the record discloses such error. Any other rule places the court in the position of appraising the amount of damage the error caused. A litigant gaining a verdict as a result of an appeal to passion and prejudice ought not to be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent. In almost every case similar to the one before us, the court has resorted to a remittitur to correct the errors occurring in the court below, even though there was no yardstick available by which the correctness of the remittitur could be measured. The perpetuation of an erroneous practice cannot supply the sound reason that should underlie its exercise. The usurpation of the functions of a jury by this court cannot be successfully condoned by a claim that it has acquired virtue

because the practice has become venerable with age and dignified by constant use.

The only justification offered in the majority opinion for imposing the requirement of a remittitur is that it has been done before on many occasions, which statement is supported by a list of cases and the amount of the remittitur allowed in each. It will be noted that the promiscuous use of the doctrine of remittitur by this court is of comparatively recent vintage. The court has gone astray only in very recent years. I might add that, while the listing of these cases may give the practice the force of numbers, it adds absolutely nothing to its legal soundness.

The writer of the majority opinion attempts to anticipate the argument that the court, by requiring a remittitur, is substituting its judgment for that of the jury by suggesting that the plaintiffs can choose between a remittitur and a retrial and that this obviates any requirement for another jury trial. The words of the majority opinion are the best evidence of the fallacy of this assertion: "The court is not substituting its judgment for that of the jury, and is not depriving the plaintiffs of another jury trial. We are simply indicating that, if a verdict had been rendered in the sum of $1,200, it would probably have met the approval of this court." It has always been my understanding that the defendant also was entitled to some consideration in the enforcement of constitutional rights. The defendant is not even placated with an option as a substitute for his constitutional right to a fair and impartial jury trial. The fact of the matter is that he is arbitrarily deprived of a jury trial and just as forcibly required to take something else in its place, and the substitute is a judgment against him, which, if rendered by the verdict of the jury, *"would probably have met the approval of this court."*

The majority opinion attempts to eliminate the question of passion and prejudice as the reason for the excessive verdict by saying: "So far as the amount of the verdict returned in this case by the jury is concerned, it cannot be set aside and disregarded as being arrived at through

passion and prejudice, for the verdict is well within the testimony returned by several of the witnesses." Later in the opinion the following is found: "The rule of this court has been that, on appeal in an action for damages, a judgment on a verdict which the clear preponderance of the evidence shows to be excessive may be reversed unless appellee files a remittitur for the excess." In the one statement the court in effect says there is no passion and prejudice because the evidence sustains the verdict, while in the other the court says the verdict is excessive by a clear preponderance of the evidence and imposes the requirement of a remittitur as a remedy for the jury's error. If an opinion be no stronger than its logic, I submit that this opinion can never be accepted as authoritative.

The verdict in the instant case was excessive because of passion and prejudice superinduced by the admission of incompetent evidence of conjectural fears and dangers not affecting the general market value of the land. Any excessive judgment, not the result of error, is in law the result of passion and prejudice. The remedy is the granting of a new trial and not the requirement of a remittitur. Passion and prejudice permeate the whole trial and vitiate the entire verdict. Obviously, passion and prejudice may be quite as effective in begetting a wholly wrong verdict as to produce an excessive one. For this court to say that $683 of the verdict was the result of the passion and prejudice of the jury and that the remaining $1,200 is free from any such vice constitutes, in my judgment, a trespass into the realms of the divine.

The following cases, in addition to the Nebraska cases cited, sustain my contention that a new trial is the only proper remedy in the instant case. *Rhyne v. Turley*, 37 Okla. 159, 131 Pac. 695; *Davis Iron Works Co. v. White*, 31 Colo. 82, 71 Pac. 384; *Cleveland Ry. Co. v. Mueller*, 31 Ohio App. 488, 166 N. E. 391; *Minneapolis, St. P. & S. S. M. R. Co. v. Moquin*, 283 U. S. 520, 51 S. Ct. 501, 75 L. Ed. 1243.

This court ought to impose upon itself the same discipline

with reference to the preservation of constitutional guaranties that it imposes upon other departments of government which the people have likewise been obliged to trust with power. Our very form of government requires that judicial decisions be based upon rules of law and not upon the whim or caprice of the judge. A failure to adhere to and maintain this principle can only result eventually in a form of judicial oppression.

SIMMONS, C. J., concurs in the dissent.

There does not appear to be a material dispute between the majority opinion and the dissent of Carter, J., on the rule as to the proper measure of damages in cases of this character. The dissent presents the question of the evidence properly admissible under the rule. I concur in the conclusion reached by Carter, J., in his dissent on that question, and likewise in his conclusion on the question of the remittitur ordered herein.

FEDERAL FARM MORTGAGE CORPORATION, APPELLEE, V. WILLIAM J. THIELE, APPELLANT.
290 N. W. 471

FILED MARCH 1, 1940. No. 30654.

1. **Mortgages.** Section 1, ch. 41, Laws 1933, amending section 20-2141, Comp. St. 1929 (now Comp. St. Supp. 1937, sec. 20-2141), providing: "When a petition shall be filed for the satisfaction of a mortgage, the court shall have the power only to decree and compel the delivery of the possession of the premises to the purchaser thereof," *held* not to abolish actions at law on debts secured by real estate mortgages, and suit may be brought on a promissory note secured by a real estate mortgage at the election of the creditor.
2. ———. Sections 20-2142, 20-2144, and 20-2145, Comp. St. 1929, providing for the contingency of the creditor electing to sue on a note (debt), were left intact and not amended or repealed by the legislature of 1933, in passing chapter 41, Laws 1933, amending sections 20-2141, 20-2143, Comp. St. 1929.
3. **Statutes.** "Statutes should be so construed as to give effect to the intention of the legislature, and if a statute is plain and

unambiguous, there is no room for construction or interpretation." *Shellenberger v. Ransom*, 41 Neb. 631, 59 N. W. 935.

APPEAL from the district court for Platte county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

Wagner, Wagner & Albert, for appellant.

Walter, Flory & Schmid, Philip M. Wellman, William W. Graham and *Franklin L. Pierce, contra.*

Heard before SIMMONS, C. J., EBERLY, CARTER, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

Plaintiff brought this action at law on a promissory note for $1,500, dated May 22, 1934, and secured by a real estate mortgage. The cause was tried to the court, judgment rendered in favor of plaintiff, and defendant appeals.

Defendant in his answer alleges that the note was secured by a real estate mortgage; that defendant owned the real estate at the time the note and mortgage were executed and delivered; that plaintiff is not entitled to sue on the note because such a proceeding is an indirect proceeding to satisfy the mortgage, and the plaintiff is limited in its relief to possession of the real estate. The second defense is that plaintiff had agreed with defendant to look solely to the real estate for the satisfaction of the debt.

Appellant contends the court erred in holding that the holder of a note secured by a real estate mortgage, executed after the deficiency law (Laws 1933, ch. 41) became effective, may maintain suit upon such note.

Section 1, ch. 41, Laws 1933 (Comp. St. Supp. 1937, sec. 20-2141) provides: "When a petition shall be filed for the satisfaction of a mortgage, the court shall have the power *only* to decree and compel the delivery of the possession of the premises to the purchaser thereof." (Italics ours.)

Appellant's contention is that the word "only" appearing in said section provides the only remedy for satisfaction of a mortgage in Nebraska, and the suit on the note, secured by a real estate mortgage, is a proceeding to satisfy that

mortgage; that this provision of the statute limits the mortgagee to the sale of the mortgaged property. In furtherance of this contention appellant states: "The law in force where a contract is made is as much a part of the contract as if it were expressed therein," citing *Watkins & Co. v. Kobiela*, 84 Neb. 422, 121 N. W. 448; 13 C. J. 560; 12 Am. Jur. 14, sec. 386; that, therefore, the contract is that the debt shall be satisfied by the sale of the real estate securing it, and that the only remedy is the right to sell the real estate and deliver possession.

The case of *Seieroe v. First Nat. Bank of Kearney*, 50 Neb. 612, 70 N. W. 220, is cited by appellant on the proposition of law that agreements to look to security alone are valid, which, for the purposes of this case, would mean that the law relating to deficiency judgments, in effect at the time of the signing of the note in question, secured by a real estate mortgage, governs and becomes a part of the contract between the mortgagee and the mortgagor, wherein, by such law, the mortgagee is to look to the land only for the payment of the debt. The cited case was an action on a promissory note secured by a real estate mortgage containing this clause: "But no general execution shall issue herein against the maker or indorser of said note, but the mortgagee, or his assigns, shall be entitled to immediate possession of the premises * * * and shall take the same in full satisfaction of said debt;" that is, upon failure of the mortgagor to comply with the conditions of the mortgage for nonpayment of interest or taxes; and the court held such clause "to exempt the makers and indorsers of the note from personal liability thereon, and to restrict the remedy of the holder of the mortgage security."

It will be readily ascertained that the clause quoted is a direct agreement between the parties, stating definitely in what manner they would be bound, and presents a clear distinction between the *Seieroe* case and the one at bar, for the reason that in the instant case there was no such agreement between the mortgagee and the mortgagor at the time of the execution and delivery of the note secured by the

real estate mortgage, and the construction of a statute was not involved.

The case of *Grand Island Savings & Loan Ass'n v. Moore,* 40 Neb. 686, 59 N. W. 115, is of no assistance to the appellant for the proposition of law claimed. In that case the mortgage contained a provision permitting the mortgagee to elect to collect the whole amount due on the happening of a contingency, and to authorize the mortgagee, on the happening thereof, to proceed not only to foreclose the mortgage, but to enforce personal liability on the note. This constituted an agreement between the mortgagee and the mortgagor and likewise did not involve the construction of a statute.

In the case of *Kennedy v. Hungerford,* 110 Neb. 22, 192 N. W. 959, at the time the note and mortgage were executed the payee agreed with the maker that he should not be liable personally on the note until the remedy provided by the mortgage against the land had been exhausted. It was therein held that, "as between the original parties such an agreement, if adequately proved, would abate the action upon the note until the condition of the agreement had been fulfilled." The court in the opinion stated: "Of course, in the absence of such an agreement there is no obligation upon the part of the mortgagee to foreclose the mortgage before beginning an action at law upon the note which it is given to secure." Citing *Grable v. Beatty,* 56 Neb. 642, 77 N. W. 49, and *Meehan v. First Nat. Bank of Fairfield,* 44 Neb. 213, 62 N. W. 490.

This court has held that a creditor whose debt is secured by a real estate mortgage may, at his election, sue at law or foreclose the mortgage. In *Grable v. Beatty, supra,* it was held:

"The holder of a note, which is secured by a mortgage, may maintain an action at law on the note, where neither note nor mortgage contains stipulations making the mortgaged property primarily liable for the debt.

"In the absence of an agreement by a mortgagee to look primarily to his security for satisfaction of the debt, a fore-

closure of the mortgage is not a condition precedent to an action at law on the secured claim."

See, also, *Federal Farm Mtg. Corporation v. Hughes, ante,* p. 454, 289 N. W. 866; *Federal Farm Mtg. Corporation v. Cramb, ante,* p. 553, 290 N. W. 440. The distinction is therefore clear. In the instant case, it is true, chapter 41, Laws 1933, the deficiency judgment law, was in effect when the note was executed. However, there was no agreement by which the mortgagor and the mortgagee declared that the latter would look only to the real estate for the satisfaction of the loan, and, as will be explained later in this opinion, the legislature, by the passage of chapter 41, Laws 1933, did not deprive the mortgagee of the right to proceed at law on the note. To determine this question we now construe the following sections of the statute referring to foreclosure of real estate mortgages.

Section 20-2139, Comp. St. 1929, provides for the filing of a petition for foreclosure and satisfaction of a mortgage in the district court. Section 20-2140, Comp. St. 1929, provides that, when a petition for the foreclosure and satisfaction of a mortgage is filed, "the court shall have power to decree a sale of the mortgaged premises, or such part thereof as may be sufficient to discharge the amount due on the mortgage, and the cost of suit." Section 20-2142, Comp. St. 1929, provides: "After such petition shall be filed, while the same is pending, and after a decree rendered thereon, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court." This provision of the statute shows that a proceeding at law on the note, for which the real estate mortgage is collateral security, is referred to and clearly indicates that such action at law cannot be brought if a petition has been filed for the foreclosure of the mortgage except and unless authorized by the court. Section 20-2144, Comp. St. 1929, provides: "Upon filing a petition for the foreclosure or satisfaction of a mortgage, the complainant shall state therein whether any proceedings have been had at law for the recovery of the debt

secured thereby, or any part thereof, and whether such debt, or any part thereof, has been collected and paid."

Particular attention is called to the language quoted above, "the complainant shall state therein (in the petition for foreclosure of the mortgage) whether any proceedings have been had at law for the recovery of the debt secured thereby, or any part thereof," which clearly indicates that an action at law on the note may be had, and if such law action has been started, or any proceedings relative thereto, the petition foreclosing the mortgage must so state. The legislature could have meant only one thing by this provision of the statute, viz., that a proceeding may be had at law on the promissory note,—the direct promise to pay the debt.

Section 20-2145, Comp. St. 1929, provides: "If it appear that any judgment has been obtained in a suit at law for the money demanded by such petition, or any part thereof, no proceedings shall be had in such case, unless, to an execution against the property of the defendant in such judgment, the sheriff or other proper officer shall have returned that the execution is unsatisfied in whole or in part, and that the defendant has no property whereof to satisfy such execution except the mortgaged premises." The foregoing provision is self-explanatory.

The language contained in chapter 41, Laws 1933, is plain, clear and unambiguous. The legislature amended section 20-2141, Comp. St. 1929, by deleting therefrom so much of the section as empowered district courts to decree deficiency judgments in mortgage foreclosures after confirmation of sale. The act eliminated one of two remedies for collection of any deficiency remaining after foreclosure of the mortgage debt. Section 20-2142, Comp. St. 1929, was not repealed or amended by chapter 41, Laws 1933, and was left intact.

Sections 20-2142, 20-2144, and 20-2145, Comp. St. 1929, providing for the contingency of the creditor electing to sue on the note (debt) were left intact. There is no conflict, in the face of its plain language, between chapter 41, Laws

1933, and other provisions of the law with regard to actions at law before, during or subsequent to foreclosure under authority of the court. Abolishment of actions at law on debts secured by mortgages is not included in chapter 41, Laws 1933. If the legislature contemplated abolishment of such actions, it could have amended the statutory provisions thereof, instead of leaving them intact.

In *Shellenberger v. Ransom*, 41 Neb. 631, 59 N. W. 935, it was held: "Statutes should be so construed as to give effect to the intention of the legislature, and if a statute is plain and unambiguous, there is no room for construction or interpretation."

We hold that a suit on a note, secured by a real estate mortgage, is a suit at law, independent, separate and distinct from a suit in equity to foreclose and satisfy a mortgage; that the legislature in amending section 20-2141, Comp. St. 1929, did not interfere with the right to bring an action at law on a promissory note secured by a real estate mortgage, as shown by the circumstances in this case.

AFFIRMED.

FRANK BLANK, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

290 N. W. 464

FILED MARCH 1, 1940. No. 30724.

Appeal. Where the record fails to disclose evidence of plaintiff's contributory negligence, it is reversible error to submit the issue of contributory negligence to the jury.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Reversed.*

Gordon Diesing, for appellant.

Kennedy, Holland, De Lacy & Svoboda, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

Plaintiff, a guest in an automobile, owned and driven by Peter Redwelski, brought this action to recover damages for personal injuries sustained by him as the result of an automobile accident when the car in which he was riding collided with a repair truck belonging to the defendant. The cause was submitted to a jury, resulting in a verdict for the defendant. Plaintiff appeals.

The pleadings of the respective parties are sufficient to join the issues on the negligence pleaded therein and will not be here set out. The record discloses the following:

About 8 o'clock in the evening of February 26, 1938, the plaintiff was riding as an invited guest, seated at the right of the driver, Peter Redwelski, in his 1934 Chevrolet sedan, proceeding south on Twenty-fourth street in the city of Omaha. The street was dry, the night dark, cold and cloudy. The car proceeded past Twenty-fourth street and Poppleton avenue, toward Woolworth avenue, there being a gradual slope to the south. The car was six feet distant from the west curb of Twenty-fourth street on the right side of the south-bound street car tracks. When it approached the intersection of Twenty-fourth street and Woolworth avenue, having traversed about three-fourths of a block, at 20 miles an hour, its headlights set for city driving, throwing light for a distance of 50 feet ahead, plaintiff observed the truck approaching them. The headlights on the truck were not burning, and when the Chevrolet's lights disclosed the truck, plaintiff immediately exclaimed: "Look out, Pete, there is a car." At that moment the truck lights were switched on, blinding plaintiff. There was no torch burning in the telephone pole immediately in front of the Gurley house, which will be referred to later in the opinion, and there were no flares or wicks burning in the vicinity to warn of danger. There was north-bound traffic on Twenty-fourth street just before the accident. On cross-examination, the plaintiff testified that he had known Redwelski for six or seven years, had been in the car on two or three occasions within a month or so; did not see a street light

burning at Twenty-fourth and Woolworth avenue, and did not notice a street light on the east side of Twenty-fourth, approximately 100 or 150 feet from the intersection; nor did he notice lights in the filling station, located at the southeast corner of the intersection. Redwelski corroborated the testimony of plaintiff in detail. He stated that he was driving at a speed of 25 miles an hour.

Sebastian Sortino testified that on the evening in question he was driving south on Twenty-fourth street at a speed of 20 to 25 miles an hour, and when approaching the intersection of Twenty-fourth and Woolworth avenue, driving five or six feet from the west curb, his lights disclosed at a distance of 50 feet in front of him the street car truck, which was between the south-bound tracks and the west curb and standing stationary; he swerved his car to the right, barely missing a pedestrian; then turned the corner and parked on the north side of Woolworth; walked north on Twenty-fourth street, noticed the repair truck 15 to 20 feet from the corner north of Woolworth, between the west curb of Twenty-fourth street and the south-bound tracks. He was bound for the Gurley home, which was about 40 to 45 feet north of the intersection of Twenty-fourth and Woolworth. While he was standing on the third step of the Gurley home, he saw, 30 or 35 feet away, the Chevrolet car traveling south, about six feet from the west curb. The truck kept moving slowly toward the north, with no headlights burning. The Chevrolet suddenly swerved toward the curb; the lights of the truck flashed on, and the two cars collided. After the accident, the rear wheels of the Chevrolet were up against the curb, the car facing southeast. The truck was about five feet from the front of the Chevrolet north; the front bumper of the sedan was headed right into the left door of the truck. The witness testified that he saw no flares on the telephone pole, the only pole between the place of the accident and the corner. On cross-examination he testified that when he first observed the truck it was straddling the west rail of the south-bound tracks at a distance of about 15 feet from the north curb line of Woolworth avenue, standing stationary.

Frances Lenczowski testified that she was walking down Twenty-fourth street on the west side thereof, going south, and when about 100 feet north of Twenty-fourth and Woolworth she saw the truck "in the middle of the south-bound car line and the curb," between the west curb and the south-bound tracks; the truck, without headlights burning, was moving slowly north toward her; she saw the Redwelski car proceeding south; saw it swerve to the right; saw the truck flash on its lights. She testified that after the accident the "rear end of the car was facing this telephone pole touching the curb almost;" the front of the Chevrolet "was facing at an angle southeast;" the accident happened about 30 to 35 feet from the intersection of Woolworth and Twenty-fourth. On cross-examination the witness stated that the lights in the filling station were burning; that there was no street light at the intersection.

J. W. Gurley testified that he was looking out of a south window in his home, which faces east on Twenty-fourth street and is 35 or 40 feet north of the intersection of Twenty-fourth and Woolworth; he noticed the flash from the trolley wire that made connection with the rail in the intersection, near the southwest corner, on which corner are located a grocery store and a street light. The street light was not burning. He could see from the lights in the filling station the men working on the trolley wire; "saw some one out with a stick or something that looked as if they were trying to rake the trolley wire away from the rail;" the repair truck was straddling the west rail of the south-bound track; he watched at the window for a moment or so; then left the window, subsequently heard a crash, went to the door and met Sortino. After calling for an ambulance, he went out into the street, saw a Chevrolet automobile standing in the street, headed toward the southeast; the rear wheels of the car were near the west curb of Twenty-fourth street, directly in front of his home; the truck was five or six feet north of the left side of the Chevrolet; there were no flares burning and no torch burning on the telephone pole.

The testimony of defendant's witnesses follows: There was no "outrage of lights" or replacement thereof in the vicinity of Twenty-fourth and Woolworth on the night in question. The street lights were 400-candle power. The repair truck was a ton and a half truck, painted yellow, with a tower on it, averaging about 12 feet in height and, when raised, 20 feet. When the truck arrived to repair the wires, a flare, producing a red flame, was placed in the telephone pole in front of the Gurley home about seven feet distant from the ground. A holder on each side of the lights on the truck contained a red flag which could be seen by the lights. The lights on the truck were burning at all times, as were the street lights in the vicinity of Twenty-fourth and Woolworth and the lights in the filling station. The trolley wire to be repaired was broken about 10 feet north of the south turn of Woolworth avenue and was down for a distance of 90 to 100 feet, and required replacement from the first north span. One of the workmen for the defendant stood 12 to 15 feet in front of the truck in the center of the south-bound tracks. Witnesses for the defendant testified that at the time of the accident they could see the Chevrolet car coming from the north for a distance of 100 to 150 feet, straddling the west rail of the south-bound tracks; that it did not slacken its speed or change its course, and when 10 or 12 feet from the workman in front of the truck his son, standing on the sidewalk, called for him to look out, and he stepped back; the Chevrolet barely missed him and proceeded directly into the truck, which was standing on the rails of the south-bound track, headed north, with the platform of the tower right beneath the trolley wires, and the brakes on the truck set. The truck driver testified he did not flash on his lights at any time; that the cab of the truck was opposite the pole on the west side of the street; that automobiles passed between the truck and the west curb while it was standing there. The distance that the truck was knocked back north at the time of the impact varied from 15 to 20 feet, according to defendant's witnesses. The Chevrolet swung around toward the west and south, about

even with the telephone pole, stopping with the rear wheels on the curb line. The repair truck stopped with its wheels to the north. The left end of the front axle of the truck was badly bent; the wheel would not turn, and the left front wheel was cramped under the frame; the chassis was bent, and the steering wheel would not operate. To clear the street for traffic, it was necessary to drag the truck. It was not moved until the police arrived and took measurements, and it was then taken away by defendant's wrecker. The light on the southwest corner of Twenty-fourth street and Woolworth avenue was burning, as well as the lights in the grocery store and in the filling station.

The measurements of distances, as shown by exhibit 42, made to scale of one inch to 10 feet, disclose the distance from curb to curb on Twenty-fourth street, running north and south, to be 39 feet, 3 inches, with double car tracks running through the center of the street, leaving a distance, from the east rail of the north-bound track to the curb, of 12 feet, 8 inches, and, from the west rail of the south-bound track to the curb, 12 feet, 11 inches, on the west side. A trifle over 48 feet north of the intersection in question is the pole directly in front of the steps of the Gurley home, where the flare was presumably placed, and this location was also the scene of the accident. On the southwest corner of the intersection is the grocery store and in front of it an overhead street light. There is also a light on Twenty-fourth street north 144 feet distant from the filling station. The proximate distance from the grocery store to the scene of the accident would not exceed 80 feet. Estimates of the proximate distance between the filling station and the scene of the accident vary from 90 to 100 feet.

By measurement, a person standing inside of the Gurley home, looking south to a place in the center of the south-bound tracks, would be looking from a distance of 82½ feet to discern an object. Gurley testified that he discerned at that distance, from the lights in the filling station, a man with a stick lifting a wire. The witness Woodward, employed by the police department, arrived at the scene of

the accident about five minutes thereafter, made some notes and prepared a drawing, or map, received in evidence. He testified that the distance from the right front fender of the Redwelski car, as it faced slightly to the southeast, to the left front fender of the truck was 22 feet, 2 inches; that the left rear wheel of the truck was 12 feet, 2 inches, from the west curb, and that about half of the Redwelski car was on the west sidewalk. To recall the testimony of Redwelski, he did see the truck within a distance of 50 feet, applied his brakes, then released them, and attempted to turn to the right to avoid the accident. He further stated that he could stop his car within a radius of 35 to 40 feet, going at a speed of 20 to 25 miles an hour.

The left fender of the Redwelski car collided with the left front fender of the truck. The jury had the benefit of the testimony showing that men were working on the truck tower with appliances, repairing the trolley wires, at the time of the accident, and whether or not, if the position of the truck was such as testified to by plaintiff's witnesses, the men could have accomplished the work.

Plaintiff contends that the court erred in instructing the jury on the contributory negligence of the plaintiff, when, in fact, the evidence was insufficient to show the plaintiff guilty of any negligence. In instruction No. 5 the court properly instructed: "The negligence of the driver of the car in which the plaintiff was riding is not imputed to the plaintiff." The court then, in the same instruction, instructed with reference to the driver's negligence being the proximate and sole cause of the accident without any negligence on the part of the defendant, and in instruction No. 9 gave the comparative negligence rule, as applied to the plaintiff and the driver of the defendant's truck; likewise, instruction No. 12, wherein the jury were told that, if they found plaintiff to have been negligent but not to the extent to defeat recovery, then they would be privileged to reduce the amount of recovery in the proportion which plaintiff's negligence bears to the total negligence of plaintiff and defendant.

We have extensively reviewed the facts as disclosed by the record and fail to find any evidence that would warrant the submission to the jury of the issue of contributory negligence on the part of this plaintiff, and we are not privileged to determine upon what theory the jury found for the defendant; that is, whether it was the contributory negligence of the guest or the negligence of the driver of the car that was the direct and proximate cause of the injuries sustained by the guest. If the jury were permitted to pass upon the question of the contributory negligence of the guest, under the circumstances of this case, and predicate their verdict on such instructions, then the instructions were prejudicial to the substantial rights of the plaintiff. This court has, on repeated occasions, announced that where the evidence fails to show contributory negligence on the part of a plaintiff the issue should not be submitted to the jury. This principle of law is so well established that citation of authorities is deemed unnecessary.

Other assignments of error need not be discussed.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

HENRY HAWK, APPELLANT, V. JOSEPH O'GRADY, WARDEN, APPELLEE.

290 N. W. 911

FILED MARCH 8, 1940. No. 30708.

1. **Habeas Corpus.** "On an application for a writ of habeas corpus, errors or irregularities in the criminal trial, not jurisdictional, will not be considered." *In re Fanton*, 55 Neb. 703, 76 N. W. 447.
2. ———. To obtain a release by habeas corpus, the judgment or sentence must be an absolute nullity.
3. ———. The sentence in the instant case, imposing punishment by confinement in the state penitentiary, is regular and in strict accord with the statutes.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Henry Hawk, pro se.

Walter R. Johnson, Attorney General, and *George W. Ayres, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

EBERLY, J.

Henry Hawk, this record discloses, presented his petition for a writ of habeas corpus to the district court for Lancaster county. On the basis that the petition was wholly insufficient to constitute a cause of action, the prayer of the same was denied. Hawk appeals.

From the record before us, it appears that Henry Hawk was convicted in the district court for Douglas county, Nebraska, of "First Degree Murder while attempting to rob," and on March 19, 1936, it was considered, ordered and adjudged by that court "that the defendant, Henry Hawk * * * be returned to the Federal Penitentiary at Leavenworth, Kansas, and at the expiration of the sentence he is now serving therein, he be by the warden of the said Federal Penitentiary delivered into the custody of the sheriff of Douglas county, Nebraska, *and be taken by said sheriff to the Nebraska State Penitentiary at Lincoln, Nebraska, and that said defendant be there imprisoned at hard labor during the term of his natural life.*" (Italics ours.)

At the time of his trial and sentence in the district court for Douglas county, Hawk was under sentence imposed by the federal court. The order made by the state court was no more than a mere recognition of that fact, consistent with comity which prevails between these jurisdictions. The valid sentence imposed by the district court for Douglas county we have indicated by italics above. It is under these provisions, so italicized, that the petitioner is detained in custody. Even if the provisions of the order and sentence relative to delivery of custody of the prisoner to the federal

officers and the return of the custody of the prisoner to the sheriff of Douglas county on completion of his federal sentence were to be deemed in excess of the powers of the district court for Douglas county, still under existing circumstances Hawk would be entitled to no relief.

We are committed to the rule that, "On an application for a writ of habeas corpus, errors or irregularities in the criminal trial, not jurisdictional, will not be considered." *In re Fanton,* 55 Neb. 703, 76 N. W. 447.

And, to obtain release by habeas corpus, the judgment or sentence must be an absolute nullity. *Hulbert v. Fenton,* 115 Neb. 818, 215 N. W. 104.

So far as the sentence in this case imposing punishment by confinement in the state penitentiary is concerned, it is regular and in strict accord with the statutes.

It follows that the denial of the writ of habeas corpus by the district court for Lancaster county, because of the manifest insufficiency of the application for the same, was, in all respects, proper, and is approved.

AFFIRMED.

FRED V. THOMPSON, APPELLANT, V. JOSEPH O'GRADY, WARDEN, APPELLEE.
290 N. W. 716

FILED MARCH 8, 1940. No. 30714.

1. **Indictment and Information.** By statute the county attorney of Douglas county is authorized to appoint deputies to assist him in the discharge of his duties, and a deputy so appointed and qualified may sign a criminal information.
2. ———. When the right of a person to sign an information as deputy county attorney is questioned for the first time after arraignment and plea of guilty, which plea has not been withdrawn, his appointment, qualification and right to sign, in the absence of showing to the contrary, will be presumed.
3. **Criminal Law.** "A plea of guilty waives any defect not jurisdictional, and which may be taken advantage of by motion to quash or by plea in abatement." 16 C. J. 403.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Fred V. Thompson, pro se.

Walter R. Johnson, Attorney General, and *George W. Ayres, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

EBERLY, J.

Fred V. Thompson, the petitioner in a habeas corpus application, appeals from the final order of the district court for Lancaster county denying him the relief prayed for.

In his petition for a writ of habeas corpus, filed in the district court for Lancaster county on February 25, 1939, relator alleges that, in the district court for Douglas county, Nebraska, he was charged with a robbery committed on January 25, 1935, and when arraigned in that court he pleaded "guilty;" that by that court, on March 30, 1935, a judgment was made and sentence imposed against him, that he be taken to the state penitentiary and there imprisoned for a period of 20 years from and after that date. Relator, in effect, alleges that the information upon which he was convicted and sentenced was a "nullity," and wholly void, "in that it was not made, signed, verified, nor filed by a person authorized by law so to do." It may be said that the "charge" or "body" of this instrument is not challenged or questioned. The information thus attacked is in the form following, viz.:

"The State of Nebraska, Plaintiff, —vs— Tony Yankish and Fred V. Thompson, Defendants.	38-440.	Information: Robbery

"Now comes the County Attorney on behalf of the State of Nebraska and presents to the Court an information against the above named defendants, which is hereby ordered of record. Said information reads and is as follows, to-wit: * * *

"The State of Nebraska } ss
County of Douglas }

"Of the February term of the District Court of the Fourth Judicial District of the State of Nebraska, within and for the County of Douglas and State of Nebraska, in the year of our Lord one thousand nine hundred thirty-five, I, Paul J. Garrotto, Chief Deputy County Attorney, in and for the County of Douglas in said State of Nebraska, who prosecutes for and in behalf of said State, in the District Court of said District, sitting in and for said County of Douglas, and duly empowered by law to inform of offenses committed in said County of Douglas, come now here in the name and by authority of the State of Nebraska, and give the Court to understand and be informed, that on or about the 25th day of January in the year of Our Lord one thousand nine hundred thirty-five, Tony Yankish and Fred V. Thompson, late of the County of Douglas aforesaid, in the County of Douglas and State of Nebraska aforesaid, then and there being, then and there in and upon one Leo Herdzina, unlawfully, feloniously, forcibly and by violence did make an assault, and him, the said Leo Herdzina, in bodily fear then and there feloniously did put, and then and there from the person of him, the said Leo Herdzina, and against his will, unlawfully, feloniously, forcibly, by violence and by putting him in fear, did steal, take and carry away Two Hundred Ten Dollars in good and lawful money of the United States of America of the value of $210.00, the personal property of Metropolitan Utilities District, a public corporation, and which was then and there in the care, custody and control of said Leo Herdzina as Manager of said corporation, with the intent of them, the said Tony Yankish and Fred V. Thompson, in so doing, unlawfully, forcibly and with violence to steal, take and carry said property away: contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Nebraska.

"Paul J. Garrotto, Chief Deputy County Attorney.

"The State of Nebraska } ss
County of Douglas }

"I, Paul J. Garrotto, being first duly sworn, on oath depose and say that I know the contents of the foregoing information; that I have read the same, and the facts set forth in said information are true to the best of my knowledge and belief.

"Paul J. Garrotto

"Subscribed in my presence and sworn to before me this 7th day of March, A. D., 1935.

"Frank McGrath,
"Clerk of the District Court
"(Seal) By Maxwell F. McCollough,
"Deputy."

As applied to the foregoing instrument, relator's contentions are fully answered by the doctrines of this court announced in *Holland v. State*, 100 Neb. 444, 160 N. W. 893, viz.:

"1. 'It is too late to object to the verification of an information after the accused has been arraigned, and pleaded not guilty, unless such plea has been withdrawn.' *Johnson v. State*, 53 Neb. 103.

"2. Section 5599, Rev. St. 1913, authorizes a county attorney to appoint deputies to assist him in the discharge of his duties, and a deputy so appointed and qualified may sign a criminal information.

"3. When the right of a person to sign an information as deputy county attorney is questioned for the first time after arraignment and plea, and while a plea of not guilty is still pending, his appointment, qualification and right to sign, in the absence of a showing to the contrary, will be presumed."

See, also, 31 C. J. 635.

Then too, "The general rule is that where an objection is not made at the time prescribed by law, the ground of objection is waived. The rule that objections not made in the lower court will not be considered when made for the

first time on appeal is applicable to objections to defects in an indictment or information, and ordinarily the right to make such objections is waived if they are not made until the cause has been submitted to the jury." 12 Standard Ency. of Procedure, 661.

It is also a well-established principle of criminal procedure that, "A plea of guilty waives any defect not jurisdictional, and which may be taken advantage of by motion to quash or by plea in abatement." 16 C. J. 403.

See, also, *Johnson v. State,* 53 Neb. 103, 73 N. W. 463; *Emery v. State,* 78 Neb. 547, 111 N. W. 374; *Matters v. State,* 120 Neb. 404, 232 N. W. 781; *Buthman v. State,* 131 Neb. 385, 268 N. W. 99.

It follows, therefore, that objections to the information in the instant case, and to the sentence based thereon, because it was "made, signed, verified and filed" by "Paul J. Garrotto, Chief Deputy County Attorney" in and for the county of Douglas, state of Nebraska, at the time when first made and disclosed, came too late and were wholly unavailing. Delay operated as a waiver. In addition, the deputy county attorney was vested with ample authority to perform the questioned act.

The judgment of the district court, therefore, is in all respects correct, and is

AFFIRMED.

EARL ALEXANDER, APPELLANT, V. JOSEPH O'GRADY, WARDEN, APPELLEE.

290 N. W. 718

FILED MARCH 8, 1940. No. 30743.

1. **Habeas Corpus.** "It is a general rule that habeas corpus will not lie to discharge from custody one serving a penal sentence, if the court imposing such sentence had jurisdiction of the offense and of the person of the defendant, and the sentence was within the power of the court to impose." *In re Carbino,* 117 Neb. 107, 219 N. W. 846.

2. **Criminal Law.** "The constitutional right of accused to have the assistance of counsel may be waived, and a waiver will be implied where accused, being without counsel, fails to demand that counsel be assigned him." 16 C. J. 821.
3. ———. "A person charged with crime may, by a judicial confession of guilt, waive all the rights secured to him by section 11, article I of the Constitution." *McCarty v. Hopkins*, 61 Neb. 550, 85 N. W. 540.

APPEAL from the district court for Lancaster county: JOHN L. POLK, JUDGE. *Affirmed.*

Earl Alexander, pro se.

Walter R. Johnson, Attorney General, and *George W. Ayres, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

EBERLY, J.

This is an appeal by Earl Alexander from the denial of a writ of habeas corpus by the district court for Lancaster county, Nebraska; that court having determined that his petition for the same "fails to state a cause of action in favor of relator." A certified copy of the judgment and sentence imposed upon appellant by the district court for Thurston county, Nebraska, is attached to the relator's application and forms a part thereof. Omitting the formal parts, the substance thereof is as follows, viz.:

"Now, on this 29th day of May, A. D. 1936, this cause came on for hearing upon the information filed herein by the County Attorney, the State appearing by Robert G. Fuhrman, County Attorney, and the defendant, Earl Alexander, appearing in person but without attorney.

"Thereupon the information herein was read to the defendant and he was asked how he plead thereto to which he replied 'Guilty.'

"The court thereupon read to the defendant section 29-2217, Compiled Statutes of Nebraska for 1929, and asked the defendant whether, after hearing and knowing what

penalty could be inflicted upon him under his plea of guilty, he still desired to plead guilty. To this interrogation by the court the defendant answered in the affirmative.

"Thereupon the court asked the defendant if he had anything to say why judgment and sentence of the court should not be pronounced upon him, to which he replied in the affirmative. The defendant thereupon addressed the court, asking that he be given a further chance. The court then asked for and received the remarks of the County Attorney.

"The court thereupon passed judgment and sentence as follows:

"It is the judgment and sentence of the court that the defendant, Earl Alexander, be confined in the penitentiary of the State of Nebraska at hard labor, Sundays excepted as to hard labor, no part of which shall be in solitary confinement, for a period of seventeen years (17), and pay the costs of prosecution herein.

"And it is, further, ordered, that the defendant be and he is hereby, committed to the custody of the Sheriff of Thurston County, Nebraska, who will convey him to the penitentiary of the State of Nebraska for service of the sentence pronounced herein. Costs $96.33.

"By the Court: Mark J. Ryan, District Judge."

Relator predicates his right to relief on two grounds: (1) That "the judgment fails to disclose an offense or to specify the offense of which the defendant was convicted," and (2) that defendant was "deprived of his liberty without the assistance of counsel for his defense."

"Habeas corpus is a collateral, and not a direct, proceeding, when regarded as a means of attack upon a judgment sentencing a defendant." *Hulbert v. Fenton,* 115 Neb. 818, 215 N. W. 104.

The judgment or sentence in a criminal case is thus supported by the usual presumptions of validity when thus attacked.

To obtain release from a sentence by habeas corpus, it must be absolutely void. *Hulbert v. Fenton, supra*; *Michael-*

son v. Beemer, 72 Neb. 761, 101 N. W. 1007; *In re Carbino*, 117 Neb. 107, 219 N. W. 846.

In view of the collateral nature of the proceeding, facts, as distinguished from mere legal conclusions, must be alleged by the relator to negative the legal force and effect of the judicial record he has pleaded, including the presumptions of validity and regularity which the terms thereof invoke. There is no requirement of statute that the terms of the information be incorporated in the journal entry covering the imposition of penalties inflicted thereunder. Then too, the validity of a judgment record must be determined by due consideration of all proper entries and parts thereof construed together. In the instant case, the relator's petition establishes the existence of an information, presented and filed by the county attorney, which charged the relator with a crime; that relator pleaded guilty to the charges therein contained, and upon such plea of guilty was sentenced by the district court, which sentence has not been appealed from. But relator has wholly failed to allege the terms or legal effect of the information on which the judgment he seeks to collaterally attack was based. Obviously the presumption of regularity and validity, which supports judicial proceedings when collaterally attacked, supplies what relator's omission in his pleadings have produced. Under these circumstances, in the absence of averment to the contrary, we must assume that the information properly charged the offense to which relator pleaded guilty and upon which the district court for Thurston county rightfully imposed the sentence sought to be invalidated by this proceeding. 34 C. J. 517.

"It is a general rule that habeas corpus will not lie to discharge from custody one serving a penal sentence, if the court imposing such sentence had jurisdiction of the offense and of the person of the defendant, and the sentence was within the power of the court to impose." *In re Carbino*, 117 Neb. 107, 219 N. W. 846.

As to the failure of the trial court to provide relator with the services of an attorney, the rule appears to be, viz.:

"The constitutional right of accused to have the assistance of counsel may be waived, and a waiver will be implied where accused, being without counsel, fails to demand that counsel be assigned him." 16 C. J. 821.

So, also, this court is committed to the view that, "A person charged with crime may, by a judicial confession of guilt, waive all the rights secured to him by section 11, article I of the Constitution." *McCarty v. Hopkins*, 61 Neb. 550, 85 N. W. 540.

It follows that the action of the district court for Lancaster county in its denial of the issuance of the writ of habeas corpus was, under the circumstances set forth in this record, correct, and it is

AFFIRMED.

FRANK DUNHAM, APPELLANT, V. JOSEPH O'GRADY, WARDEN, APPELLEE.

290 N. W. 723

FILED MARCH 8, 1940. No. 30778.

1. **Criminal Law.** Section 20-1310, Comp. St. 1929, is a provision of our Civil Code applicable to civil proceedings only, and wholly inapplicable to criminal prosecutions.
2. **Habeas Corpus.** Section 29-2814, Comp. St. 1929, is, by its terms, limited in application to cases where the imprisoned party is in custody by virtue of any warrant or commitment of a magistrate of this state having jurisdiction of criminal matters, and has no application whatever to cases where persons are imprisoned in the state penitentiary under sentence imposed by courts of record.
3. ———. The instant case is ruled by section 83-935, Comp. St. 1929, which provides: "When any convict is delivered to the warden the officer having such prisoner in charge shall deliver to the warden a certified copy of the sentence received by such officer from the clerk of the court where such convict was tried, and shall take from the warden a certificate of the delivery of such convict, and such certified copy of the sentence shall be evidence of the facts therein contained."

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Frank Dunham, pro se.

Walter R. Johnson, Attorney General, and *George W. Ayres, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

EBERLY, J.

Frank Dunham, relator, appeals from the final order entered in the district court for Lancaster county on May 9, 1939, upon his application for a writ of habeas corpus, wherein that court determined that "the relator is not unlawfully imprisoned or detained by the respondent," and denied the relief sought. Relator appeals. The correctness of the determination made is challenged on the grounds that the judgment of conviction or sentence fails to specify the offense of which the relator was convicted, or to designate when the sentence is to take effect.

Omitting formal parts, the judgment of conviction here involved is as follows:

"March 11, 1938. Defendant, Frank Dunham, was duly arraigned and entered a plea of 'Guilty.' Defendant was thereupon examined and made a full disclosure. Defendant was thereupon *ask* if he had anything to say further why sentence should not be pronounced upon him and had none.

"It is therefore considered and adjudged that defendant be confined in the Nebraska State Penitentiary at Lancaster in Lancaster county, Nebraska, at hard labor, Sundays and Holidays excepted, for a period of five (5) years, solitary confinement to be no part of this sentence. Costs taxed to defendant. E. G. Kroger, District Judge."

In support of his contentions, relator cites sections 20-1310, 29-2814 and 29-2202, Comp. St. 1929. It may be said that section 20-1310 is a provision of our Civil Code applicable to civil proceedings only, and wholly inapplicable to criminal prosecutions. Section 29-2814, as a part of the statute relating to habeas corpus, was originally enacted as a part of "An Act to Establish a Criminal Code," passed

March 4, 1873, and effective September 1, 1873. It constituted section 366 of that enactment, and by its terms its application is limited to cases where the imprisoned party is in custody, "by virtue of any warrant or commitment of any magistrate of this state having jurisdiction of such criminal matters." Section 248 of this act so passed defines "magistrate" as follows: "The term 'magistrate' in this code, when not otherwise expressly stated, is used to mean a justice of the peace, probate judge, mayor of a city, or incorporated village, or police judge." We have here presented a judgment and sentence of the district court for Hall county imposing a sentence of imprisonment in the state penitentiary for the term of five years. Section 314 of this act of 1873 limits jurisdiction of magistrates to misdemeanors "in which the fine cannot exceed one hundred dollars and the imprisonment cannot exceed three months." It is obvious, therefore, that section 29-2814, Comp. St. 1929, is wholly without application to the controversy here presented. It is ruled by section 83-935, Comp. St. 1929 (originally enacted as section 33 of chapter 75, Laws 1897), which provides: "When any convict is delivered to the warden the officer having such prisoner in charge shall deliver to the warden a certified copy of the sentence received by such officer from the clerk of the court where such convict was tried, and shall take from the warden a certificate of the delivery of such convict, and such certified copy of the sentence shall be evidence of the facts therein contained."

The certified copy of the judgment of a court of record thus constitutes the authority of the warden to retain the petitioner in the instant case. There are no specific statutory requirements as to what shall be included in the recitals of this certified copy of judgment or sentence. When it includes a statement of the nature of the imprisonment imposed and the duration thereof, it fulfills all purposes contemplated by this statute. It comes to us, as pleaded by relator in the instant case, by statute expressly made "evidence of the facts therein contained," and surrounded

by the presumption of its validity and regularity, which the allegations of relator's pleading and the issuable facts by him alleged in no manner challenge. Under these circumstances, the action of the trial court in the denial of the writ of habeas corpus was correct.

We do not overlook the claim of relator that the statutory provisions with reference to conduct of criminal trials embraced in section 29-2202, Comp. St. 1929, providing, "If the defendant have nothing to say, or if he show no good and sufficient cause why judgment should not be pronounced, the court shall proceed to pronounce judgment as provided by law," were not complied with, and that thereby and because thereof the criminal procedure followed by the trial court was wholly invalidated and the sentence imposed thereafter was likewise invalidated and nullified. It will be remembered that we are not determining these questions in a direct proceeding, but they arise only as a result of a collateral attack. It is clear that, considered as here presented, these claimed errors in no manner affect the jurisdiction of the trial court over the defendant or over the crime charged, and, therefore, the sentence imposed by the court is invulnerable to the attack as thus made. The error, if error there was, may only be redressed by a direct proceeding instituted for that purpose in a court of competent jurisdiction.

It follows that the judgment of the district court for Lancaster county is correct, and it is

AFFIRMED.

PHILIP F. ABBOUD, ADMINISTRATOR C. T. A., APPELLEE, V. LEWIS J. BOOCK, APPELLANT.

290 N. W. 713

FILED MARCH 8, 1940. No. 30784.

1. **Homestead.** The wife cannot dispose of the life estate of her husband in the homestead by her will, in absence of waiver on his part.

2. ———. The right of the surviving husband to a life estate in the homestead property in which they have lived is fixed by statute, and any disposal thereof must be in strict compliance with the applicable section of our statute.
3. ———. A surviving husband is not estopped from asserting his life estate in the homestead property by reason of having entered into a joint will with his wife in which his homestead right was not mentioned, nor because he qualified as executor of her will.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Reversed.*

Reed, Ramacciotti, Robinson & Hruska and *Henry R. Marshall,* for appellant.

Anson H. Bigelow and *Walter H. Justin, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

PAINE, J.

This is a proceeding to secure a license to sell real estate belonging to a deceased wife, in order to pay legacies given in the joint will of the husband and wife. The husband objected to granting the license on that portion in which he claimed a homestead right. The court held that the husband disposed of the right of homestead by executing the joint will, and granted the license. Motion for new trial being overruled, husband appeals.

The administrator of the estate of Anna Louise Boock made application for license to sell real estate to pay costs of administration and specific legacies, there being insufficient personal property to pay the same. The surviving husband objects to the granting of the license on the ground that the property sought to be sold was at the death of the testatrix their homestead, and by reason thereof he has a life estate therein not subject to sale. A guardian *ad litem* of the minor heirs of the deceased wife also filed objections that it would not be advantageous to sell the property at forced sale. The trial court overruled all objections, and granted a license to the administrator to sell the real estate

at private sale within 90 days from the date of the decree, to be sold upon terms approved by the court, or at public sale, in the manner provided by law, for $500 cash, and balance on confirmation, with the right to sell in separate parcels if deemed advisable by the administrator. The trial court held that the widower had disposed of his right of homestead by entering into a joint will with his wife, and that all of the real estate belonged to the deceased at her death.

The petition of the administrator set out that the taxes and costs of administration would amount to the sum of $500; that all of the personal property has been reduced to cash except some fractional interests in a possible cause of action in Cook county, Illinois, of no present value.

The petitioner further shows that the joint will of Anna Louise Boock, deceased, and her husband, Lewis J. Boock, left bequests of $1,000 to Joseph W. Corbett and $100 apiece to each of six grandchildren, making a total of $1,600 in legacies, which by the express terms of the will are made a charge against said real estate, and left the remainder of her estate to her surviving husband; that the husband was appointed executor under the will, and charged jointly with the petitioner in the administration of said estate, but the husband refused to join in an application to the court for license to sell, and thereupon Philip F. Abboud, administrator C. T. A. (*cum testamento annexo*), applied to the county court for Douglas county for authority to file his petition separately for said license, and, being duly authorized, prays for a license to sell real estate from the district court.

The guardian *ad litem* of the grandchildren filed an answer, setting forth that the costs of the administration would exceed $800, the legacies, $1,600, and that the most that can be realized from a forced sale of the real estate is $1,250, and therefore prays that license be not granted.

Lewis J. Boock, widower of Anna Louise Boock, filed answer, showing that his wife died June 26, 1937; that they were married February 11, 1915, and resided together con-

tinuously until her death, and that no children were born of said marriage. The widower further alleges that the property was purchased by the husband and wife in 1922, with the proceeds of their separate estates, although the fee title was placed in the name of the wife; that upon the death of the wife the homestead character of the property continued in the husband, and he acquired a life estate therein, and that he has continued to occupy the premises since her death, and has not by any act on his part relinquished or abandoned his homestead therein, and he therefore prays that no license be granted.

The reply of the administrator alleges that lots 1, 2, 3, and 4, in block 3, of Cottage Home View addition to Omaha, were purchased, and that they resided upon lots 3 and 4 thereof, which thereupon became their homestead, and denies each and every other allegation, and that lots 1 and 2 are not subject to the claim of homestead. He further alleges that on February 20, 1934, the husband and wife jointly executed their last wills and testaments, and delivered the same to a third person for the benefit of the survivor, and for the benefit of Joseph W. Corbett, son of the deceased, and her grandchildren; that said joint will remained unrevoked until the death of Anna Louise Boock, when it was admitted to probate as her last will and testament on July 27, 1937.

It is claimed in the brief of the administrator that the husband's act in agreeing to, and in joining in, a joint will would seem sufficient to be charged as his election to take under the will, and bar his homestead rights, especially as the Nebraska statutes do not bar disposing of the homestead life estate by will.

The answer to this argument is furnished by an examination of the two sections of our statute relating to this question. Section 40-104, Comp. St. 1929, reads: "The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife."

Section 40-117, Comp. St. 1929, reads: "If the homestead

was selected from the separate property of either husband or wife, it vests on the death of the person from whose property it was selected, in the survivor, for life, and afterwards in decedent's heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will."

"A homestead right is created by statute; not devised by a will. Undoubtedly the testatrix so understood when her will was executed. Hence, there is little, if anything, in the provisions of said will which could in any way throw light upon the intention of the parties when they made the prenuptial contract. Whatever the facts may be in that regard, the will does not constitute such material and sufficient evidence as to change the result of the trial." *Mill Owners Mutual Fire Ins. Co. v. Petley*, 210 Ia. 1085, 229 N. W. 736.

Another case from Iowa, involving an antenuptial contract, throws light on the question involved in the case at bar. Especially is this true because the homestead rights of the husband were not mentioned in the instant case.

"What effect upon this controversy is to be given to the antenuptial contract? It does not in terms make any mention of homestead or homestead rights, nor do we think it should be held that the relinquishment of such right was intended or was in the contemplation of the parties in making the contract. The homestead right is a favorite of the law, and its surrender or waiver will not be presumed, nor will such intent be inferred from the use of words of a general and indefinite signification." *Plistil v. Kaspar*, 168 Ia. 333, 150 N. W. 584.

Several opinions of this court assist us in the disposition of the case. "The law is settled that, where a husband and wife reside upon a homestead and the wife dies, the homestead character of the land continues and the surviving husband, although he may have no children or dependents residing with him, may still retain the homestead as such." *Dougherty v. White*, 112 Neb. 675, 200 N. W. 884. See, also, *Bartels v. Seefus*, 132 Neb. 841, 273 N. W. 485.

"The homestead statutes are designed to protect a person in his home, and that the nature of his title thereto is of secondary importance to his right of shelter therein." 89 A. L. R. 540, Ann.

"A widow need not account to the estate of her husband for the rents and profits of their homestead which have accrued subsequent to his death." *In re Estate of Fletcher*, 83 Neb. 156, 119 N. W. 232. See, also, *Laughlin v. Gardiner*, 104 Neb. 237, 176 N. W. 727; *Lewis v. McAdams*, 129 Neb. 490, 262 N. W. 7; *In re Estate of Robertson*, 86 Neb. 490, 125 N. W. 1093.

"Under the provisions of section 17, chapter 36, Compiled Statutes 1903, a homestead which was the separate property of the wife, at her death, vests in her surviving husband for life, and the wife has no power to limit or dispose of the life estate of the survivor by will." *Brichacek v. Brichacek*, 75 Neb. 417, 106 N. W. 473.

"Frederick Teske and wife for a valuable consideration orally agreed with Carl Teske that he should at their death have certain lands, in a part of which they had at the time a homestead estate. In an action by Carl against Frederick it was decreed that the agreement was void as to the homestead estate and valid as to the remainder of the land." *Teske v. Dittberner*, 83 Neb. 701, 120 N. W. 198.

From the exhaustive article on "Homesteads," by Dean Foster, found in 3 Neb. Law Bulletin, 389, we cite two paragraphs:

"Section 45—Rights of Possession on Death of Homestead Owner. Since a life estate in the homestead vests in the surviving spouse on the death of the owner, it follows that such spouse is entitled to possession of the homestead premises as against every one. Even though debts exist which are enforceable against the homestead, the administrator of the deceased owner's estate or the creditors must proceed to their collection not by taking possession of the property but by a judicial sale. An administrator, taking possession of the homestead, is subject to an action of ejectment and an accounting for rents and profits received. The surviving

spouse may lease the homestead and is liable to no one for an accounting of the rents and profits received subsequent to the death of the homestead owner."

"Section 46—Restraint on Testamentary Disposition. If a homestead owner were left entirely free to devise the homestead, by his mere whim or caprice, he could render of little avail the precautions that the legislature took to prevent the disruption of his home, upon his death. Hence, his power to devise is expressly restrained. Every devise he makes is subject to the life estate of the spouse, in the event of the spouse's survival. Even if the surviving spouse accepts the executorship under a will which devises the homestead to the children, the devise to the children is subject to the life estate of the surviving spouse. The assent of the spouse cannot supply the lack of power of the testator, nor can the spouse be concluded as to homestead rights on any theory of election, for no choice is here possible."

From these authorities and others which amply support us, we reach the following conclusions:

(1) That the wife cannot dispose of the life estate of her husband in the homestead by her will, in absence of waiver on his part;

(2) That the right of the surviving husband to a life estate in the homestead property in which they have lived is fixed by statute, and any disposal thereof must be in strict compliance with the applicable section of our statute;

(3) A surviving husband is not estopped from asserting his life estate in the homestead property by reason of having entered into a joint will with his wife in which his homestead right was not mentioned, nor because he qualified as executor of her will.

We therefore find that the trial court erred in granting license to sell the real estate in which the surviving husband had a life estate.

REVERSED.

FREMONT JOINT STOCK LAND BANK, APPELLEE, V. MARIE H. MORSE, APPELLEE: ELIZABETH KANE, APPELLANT.
290 N. W. 907

FILED MARCH 8, 1940. No. 30767.

Mortgages. Rentals paid in by order of the district court under the provisions of the moratory law (Comp. St. Supp. 1937, sec. 20-21,159) are required to be distributed as provided by the act. There being no taxes, interest, insurance, cost of maintenance and upkeep of the real estate to be paid, the court may properly direct the fund derived from such rentals to be applied on the portion of the mortgage debt remaining unpaid after crediting the proceeds of the sale of the mortgaged real estate.

APPEAL from the district court for Cuming county: ADOLPH E. WENKE, JUDGE. *Affirmed.*

A. R. Oleson, for appellant.

Zacek & Nicholson, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

CARTER, J.

This is an appeal from an order of the district court for Cuming county applying rents collected by the clerk of the district court under the provisions of the 1937 moratory law (Comp. St. Supp. 1937, sec. 20-21,159) to the payment of the portion of the decree of foreclosure remaining unpaid after crediting the proceeds received from the sale of the security.

The act in question provides in part that "The court shall make an order or orders for possession of such real estate, determine fair rental terms to be paid by the party or parties to be in possession and the application and distribution of the rents, income and profits from such real estate, and make such provision for the preservation of such property as will be just and equitable during the continuance of said cause, which order or orders shall provide that such rents, income or profits shall be paid to and distributed by the clerk of the district court of the county in which such suit

is pending, in accordance with the order of the court entered therein, without compensation to the clerk; and further provided, that, in such distribution, expenses of the conservator to be approved by the court, taxes, interest, insurance, cost of maintenance and upkeep of such real estate and interest shall be paid in the priority named and any balance distributed as the court may direct." It is clear that rents, income and profits are to be paid in for the benefit of the owner of the decree of foreclosure, to be applied as directed by the statute. It is stipulated that the amount remaining due, after crediting the proceeds derived from the sale of the security, exceeds the amount of rents, income and profits in the hands of the clerk of the district court for distribution. The order granting the moratory stay and fixing the rentals to be paid in by the parties in possession is not in the record. The distribution of such rents, income and profits is in accordance with the provisions of the statute. The appellant, having invoked the provisions of the moratory law, is now in no position to dispute the validity of its express provisions.

There is no error affirmatively appearing in the record. The judgment of the district court is therefore

AFFIRMED.

EULA MORRIS, APPELLANT, V. WALTER MORRIS, APPELLEE.
290 N. W. 720

FILED MARCH 8, 1940. No. 30729.

1. **Divorce.** Evidence that the former wife in a divorce proceeding has since become employed, and that the defendant-husband has again married and is unable to carry his financial load, does not afford a sufficient basis for modification of the allowance made for wife and child support, at a subsequent term, where the extent of the former wife's earnings is not shown. Comp. St. Supp. 1939, sec. 42-324.
2. ———. To avoid possible injustice in such a situation, the court may, in its discretion, remand the cause to the district court to permit evidence of the former wife's earnings to be

received and a decree to be entered conforming to the sound equities of the situation as they then appear to exist.

APPEAL from the district court for Lincoln county: ISAAC J. NISLEY, JUDGE. *Reversed.*

Dent & Deakins, for appellant.

Hoagland, Carr & Hoagland, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

JOHNSEN, J.

The question presented is whether the trial court was justified in reducing the alimony and child support allowance in the divorce decree in this case from $60 to $30 per month.

Plaintiff was granted a divorce from defendant and the custody of their nine-year-old child on June 24, 1938. The decree provided that defendant should pay plaintiff the sum of $60 per month for the support of herself and child, except that, if his income fell below $160 per month, it was to be reduced to 40 per cent. of his earnings, but in no event was it to be less than $35 per month, unless plaintiff remarried, when it should be reduced one-half. On January 21, 1939, after having paid only $130 under the decree, defendant filed this application for modification, to reduce the payments to $25 per month. The trial court, after a hearing, entered an order changing the amount of the payments to $30 per month. Plaintiff has appealed.

The application for modification was made under section 42-324, Comp. St. Supp. 1939, which provides: "After a decree for alimony or other allowance for the wife and children, or either of them, * * * the court, from time to time, on the petition of either of the parties and hearing thereon, may revise and alter such decree respecting the amount of such alimony or allowance, or the payment thereof. * * * And the court may make any decree respecting any of the matters which such court might have made in the original suit."

It has been held that an application under this section cannot be used simply to review the equities of the original decree. *McIlwain v. McIlwain,* 135 Neb. 705, 283 N. W. 845. Where it is made at a subsequent term, it must be founded, we have said, upon facts or circumstances which have arisen since the decree. *Graham v. Graham,* 135 Neb. 761, 284 N. W. 280. Except where new, controlling conditions have subsequently arisen, the matter is treated as *res judicata. Chambers v. Chambers,* 75 Neb. 850, 106 N. W. 993. These principles govern not alone an allowance for the support of the wife, but have been recognized as being applicable to an allowance for child support as well. *Wassung v. Wassung,* 136 Neb. 440, 286 N. W. 340.

To the writer it has always seemed that, where no fixed property settlement or gross sum alimony award was involved, the doctrine of *res judicata* should not have been applied and ought not to have been permitted to calcify the apparent purpose and language of section 42-324, Comp. St. Supp. 1939, and section 42-312, Comp. St. 1929. But the present situation is, of course, governed by the rules which the court has laid down and not by the writer's individual views. Testing the facts by these rules, it appears that the only changes which have occurred in the condition of the parties subsequent to the decree are that defendant has married again and that plaintiff has left the jurisdiction, with the child, and is now employed.

The fact that defendant has married again is not of itself sufficient to justify a modification of the decree. *McIlwain v. McIlwain, supra.* It is a circumstance that may be considered, however, in weighing the equities of the situation, where other facts are present sufficient to warrant the court, in its sound discretion, to modify the decree.

The subsequent employment of plaintiff is a circumstance that may justify a modification of the decree, as a matter of judicial discretion, if there are appealing equities in defendant's situation. The evidence here demonstrates rather clearly that defendant cannot reasonably carry his present family load and pay plaintiff $60 per month. He is a rail-

road brakeman, with average net earnings of $120 per month after payment of his necessary road expenses. His earnings are substantially the same as at the time of the decree. An income of $160 per month is implied in the decree, but this figure is a bit inflated and fails also to take into account his necessary road expense. He was without legal counsel in the divorce proceeding, and as a matter of emotionalism, blindness, or gesture offered to pay plaintiff $60 per month. This probably is the root of his present problem, for the court accepted his ostensible magnanimity and made no judicial inquiry into his financial situation. His willingness to pay $60 per month was expressed in the form of a written agreement incorporated into the decree, but it is not contended here that there is anything in this situation that would prevent a consideration by the court of the present application, so we are not called upon to deal with that question.

Defendant's declaration of willingness to pay was more ostentatious than his record of performance, for, as previously indicated, he had paid only $130 on the decree at the time the present application was made. Immediately following the divorce, he became involved in a legal morass of debts accumulated from the marriage, which threatened to disrupt his employment and forced him to go to the expense of bankruptcy. Plaintiff also felt it necessary to prod him with citations and with summons in garnishment against his employer.

Without detailing further facts, it is quite obvious from the record that defendant cannot reasonably carry his present financial load and pay an allowance of $60 per month. To jeopardize his employment and seniority rights further is not the answer to the difficulty, from the standpoint of either plaintiff or defendant. Our first solicitude must, of course, be for the reasonable needs of plaintiff and her child, but defendant's duty to the second wife cannot be wholly ignored, if there is any way it can fairly be taken into account. *McIlwain v. McIlwain, supra.* The fact that plaintiff is now employed is a circumstance that permits the situa-

tion of the parties to be reexamined and some adjustment to be made in the equities between them. The difficulty confronts us in this case, however, that the record contains no evidence as to the extent of plaintiff's earnings. This information seemingly was not readily available to defendant, possibly because plaintiff was not present personally at the hearing. The trial court might have required it to have been disclosed by plaintiff's counsel. Perhaps defendant did not exercise the necessary diligence to obtain it. Without it, however, we are not able to say whether the modification made by the trial court was fair or proper.

In the ordinary judicial proceeding we would be justified, perhaps, in reversing the decree and dismissing the application, but we will not blind ourselves to the possible injustice which may result in the present situation, and will remand the cause to allow evidence to be received on the extent of plaintiff's earnings, and leave the way open for a decree to be entered based upon such evidence and the equities which shall then appear to exist. Under the circumstances, we have no way of judging, and we express no opinion upon the propriety of the extent of the reduction made by the trial court on the previous hearing. Under the rule announced in *Wassung v. Wassung, supra,* no reduction can be made in the amount of the payments accrued up to the time of the filing of the application for modification, although the manner of collecting such accrued payments may, if necessary, be regulated or controlled.

REVERSED.

FRANK MILLSLAGLE V. STATE OF NEBRASKA.
290 N. W. 725

FILED MARCH 8, 1940. No. 30761.

1. **Indictment and Information.** One who aids in the commission of a crime may be charged in simple and direct terms as if he were the principal offender, but a statement of the manner of his participation in the crime, while unnecessary, does not make the information bad.

2. **Criminal Law.** The fact that an accomplice has been guilty of wilful false swearing on a material matter is a circumstance that may possibly, in a particular instance and situation, make his testimony unworthy of belief on its face, if it lacks corroboration.
3. ———. In the ordinary case, even though the accomplice may have been guilty of a conscious falsehood on a material matter, and even though his testimony is lacking in corroboration, it may not be utterly unworthy of belief on its face, and, in such a situation, the rights of an accused will be adequately protected if the jury are instructed that the testimony of an accomplice should be scrutinized closely for possible motives for falsification, and that where he has wilfully sworn falsely in regard to a material matter they should be hesitant to convict upon his testimony, without corroboration, and that in no case should they convict unless they are satisfied from the evidence, beyond a reasonable doubt, of the guilt of the accused.
4. **Opinion Modified.** *Jahnke v. State,* 68 Neb. 181, 104 N. W. 154, modified to conform to the rules expressed in the second and third syllabus points hereof.
5. **Criminal Law.** If the proceedings are otherwise free from error, a conviction based upon the uncorroborated testimony of an accomplice will only be set aside on appeal, where such testimony on its face produces an irresistible conviction of pervading taint or of inherent moral weakness which revolts our natural credulity.
6. ———. The conviction in this case is set aside for the improper admission, on rebuttal, of immaterial and incompetent testimony carrying a direct implication of defendant's guilt.

ERROR to the district court for Dawes county: EARL L. MEYER, JUDGE. *Reversed.*

Greydon L. Nichols, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Rush C. Clarke, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, MESSMORE and JOHNSEN, JJ., and KROGER and ELLIS, District Judges.

JOHNSEN, J.

Frank Millslagle, referred to herein as the defendant, brings error from a conviction for cattle stealing.

His first contention is that the information is defective, in charging him as an accessory instead of as a principal.

Section 28-201, Comp. St. 1929, provides that, "Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender." He argues that, in view of this provision, the information fails to charge a crime in alleging that he aided and abetted another to commit the theft.

It is unnecessary for us to pass upon this contention, for defendant has failed to read the complete information. It charges that, on October 11, 1938, in Dawes county, Nebraska, he did "wilfully, unlawfully and feloniously aid and abet another, to wit, one Roy Shumway, to commit an offense, to wit, the theft of certain cattle, and did then and there and thereby steal, take and drive away certain cattle, to wit, nine head of mixed heifers, the personal property of one Gerhart Aschwege * * * the owner thereof, and against his will." Paring this verbiage, it is simply a charge that defendant, at a specified time and place, feloniously aided Roy Shumway to steal nine head of cattle belonging to Gerhart Aschwege, and so was guilty of the crime of cattle stealing under section 28-515, Comp. St. 1929. It would have been sufficient to have charged defendant, in so many words, with stealing the cattle, without undertaking to set out the manner of his participation in the crime, but the addition of this explanation to the charge that he "did then and there and thereby steal" the cattle in question did not make the information bad. *Scharman v. State*, 115 Neb. 109, 211 N. W. 613.

The next contention is that the evidence is insufficient to sustain a conviction because it depends, defendant says, solely upon the uncorroborated testimony of Roy Shumway, an accomplice, who is claimed to have wilfully sworn falsely on a material matter. While the record is not entirely clear, we gather that a complaint was filed against defendant shortly after the crime, and that defendant was discharged on preliminary hearing, when Shumway testified that he alone committed the theft. Thereafter another complaint was filed against defendant, and Shumway then testified, both on the preliminary hearing and on the trial

in the district court, that defendant and he stole the cattle together and that it was defendant who had suggested the theft. Shumway explained the contradiction in his testimony with the statement that he had originally tried to shield defendant, because defendant's wife was his sister.

It is argued that the situation is controlled by *Jahnke v. State,* 68 Neb. 181, 104 N. W. 154, where it was said: "The evidence of an accomplice should be closely scrutinized. If it appears that such witness has wilfully sworn falsely in regard to a material matter upon the trial, his evidence cannot be sufficient, if uncorroborated, to support a verdict of guilty." The *Jahnke* case is cited and quoted in the recent case of *Ruzicka v. State, ante, p.* 473, 289 N. W. 852, where we held that a conviction may rest on the uncorroborated evidence of an accomplice, when, considered with all the testimony and circumstances, it satisfies the jury beyond a reasonable doubt of the guilt of the accused, but that such evidence, if uncorroborated, is insufficient to support a verdict of guilty where it appears that the accomplice has wilfully sworn falsely in regard to material matters or otherwise shown that his evidence is unreliable.

A reading of these cases will show that in both of them the court regarded the testimony of the accomplice as demonstrating on its face that it was unworthy of belief. In the *Jahnke* case, the accomplice told one story under oath before a coroner's jury; testified to another on the witness-stand in district court; executed a subsequent affidavit repudiating his testimony on the trial; and signed, finally, an affidavit retracting his repudiation. Manifestly, a court would hesitate to approve a conviction hanging on such an unstable thread. In the *Ruzicka* case, the opinion says: "The credulity of this court is such that we cannot accept the statement of Dorothy Le Grand (the accomplice) * * * as true." Here again the court would have been failing in its duty, if it had said: "In spite of the odorous falseness of the testimony, on which the conviction rests, the responsibility is not ours, but the jury's." While it is not the court's privilege to pass upon the credibility of witnesses

or the guilt of an accused as such, it cannot consciously close its eyes to an inescapable conviction that the waters of judicial administration have been utterly polluted, nor knowingly permit its processes to move in such a channel.

The fact that an accomplice has been guilty of wilful false swearing on a material matter is a circumstance that may possibly, in a particular instance and situation, make his testimony unworthy of belief on its face, if it lacks corroboration. If such testimony appears on its face to be baldly perjurious or preposterous, and there is no independent evidence upon which a conviction can rest, the trial court should not hesitate to direct a verdict of acquittal. It is not every case, however, that requires this degree of protection. In the ordinary case, even though the accomplice may have been guilty of a conscious falsehood on a material matter, and even though his testimony is lacking in corroboration, it may not be utterly unworthy of belief on its face, and in such a situation the rights of an accused will be adequately protected if the jury are instructed that the testimony of an accomplice should be scrutinized closely for possible motives for falsification, and that where he has wilfully sworn falsely in regard to a material matter they should be hesitant to convict upon his testimony, without corroboration, and that in no case should they convict unless they are satisfied from the evidence, beyond a reasonable doubt, of the guilt of the accused. On an appeal to this court, we will scrutinize the evidence also and will not hesitate to set aside a conviction based upon the uncorroborated testimony of an accomplice, where on its face it produces an irresistible conviction of pervading taint or of inherent moral weakness which revolts our natural credulity.

To the extent that *Jahnke v. State, supra,* appears to declare that a conviction resting upon the uncorroborated evidence of an accomplice, who has been guilty of a conscious falsehood on a material matter, will in every case be set aside as a matter of law, it is modified to conform to the views herein expressed. Similarly, nothing in *Ruzicka v. State, supra,* is to be construed as in conflict herewith.

Without detailing the evidence in the present case, it is sufficient to say that it is not such as would justify us in setting aside the conviction, under the foregoing rules. It may be added that the trial court in this case gave instructions that are in harmony with the principles just discussed.

We deem it necessary to consider only one further assignment of error, based on certain testimony offered by the state in rebuttal. Defendant's wife was permitted to be asked on cross-examination: "Did Roy (Shumway, the accomplice) at that time, while you were being questioned by Mr. Davis (special agent of the Nebraska Stock Growers Association) recall or attempt to recall to your memory the fact that you were at the door when your husband left on the night of October 11th and that you cried?" To which she answered, "No." On rebuttal, Davis, over proper objection, was allowed to testify as follows: "Did Roy Shumway make any statement to his sister Mrs. Millslagle concerning the evening of October, or the evening or night of October 11, 1938, in your presence at this time?" "Yes." "And what did Roy Shumway say to Mrs. Millslagle?" "Mrs. Millslagle and Bus (Roy Shumway) were talking and Bus said, 'You remember the night I got out to your place and you came to the door and you tried to get Frank and I not to get the cattle' and she wouldn't reply to it. She didn't make any statement in regard to that." The county attorney then repeated: "You have stated that Roy Shumway called her attention to the fact that on that evening she tried to get them not to go after the cattle and she refused to admit that, is that true?"

This testimony did not impeach Mrs. Millslagle on any material point, and, in the form in which it was offered, it was clearly incompetent. It might have been material to have shown by direct proof that on the night of the theft Mrs. Millslagle sought to induce defendant and Shumway not to steal the cattle, if that were the fact, but it was not material whether Shumway had said to her, at a subsequent time and in the absence of the defendant, "You remember the night I got out to your place and you came to the door

and you tried to get Frank and I not to get the cattle." The state accordingly had no right to question her about Shumway's statement. *Johnston v. Spencer,* 51 Neb. 198, 70 N. W. 982; *Carter v. State,* 36 Neb. 481, 54 N. W. 853. When it made the inquiry, it was bound by her answer and could not attempt to impeach it. *Swogger v. State,* 116 Neb. 563, 218 N. W. 416.

We recognize that the attempted impeachment of a witness on an immaterial matter will not ordinarily, perhaps, constitute prejudicial or reversible error. Comp. St. 1929, sec. 20-853. But in a criminal case, where immaterial and incompetent evidence is admitted which carries a direct implication of guilt on the part of the accused, it may obviously be prejudicial. Here, the indirect proof that Mrs. Millslagle sought to prevent defendant and Shumway from stealing the cattle may easily, in the conflicting state of the record, have helped to induce a conviction. Coming as it did, near the end of the trial, it was somewhat climactic, and it was only intensified when, at the close of all the evidence, the court had it read again in the presence of the jury and attempted to strike it from the record.

Defendant's right to a fair trial ought not thus to be sideswiped. The permanence of judicial administration depends as much upon the fairness of the processes by which a result is achieved as upon the justness of the result itself. No result is just which is achieved by unfair processes.

For the error stated, the judgment will be reversed and the cause remanded for a new trial. The other assignments of error do not necessitate further discussion.

REVERSED.

ELIZABETH BURLAGE, APPELLANT V. LEFEBURE CORPORATION ET AL., APPELLEES.
291 N. W. 100

FILED MARCH 15, 1940. No. 30701.

Workmen's Compensation. Under the workmen's compensation law of Nebraska, an injury is not compensable, where employee on his own initiative leaves his line of duty under his employment for purposes of his own and pursues those purposes to his injury and death.

APPEAL from the district court for Dodge county: FREDERICK L. SPEAR, JUDGE. *Affirmed.*

G. E. Price and *Archie C. O'Brien*, for appellant.

Dressler & Neely and *H. J. Lutz, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

ROSE, J.

This is a proceeding under the workmen's compensation law. Comp. St. 1929, sec. 48-101. Elizabeth Burlage, dependent widow of the employee, Walter W. Burlage, is plaintiff. The defendants are the employer, Lefebure Corporation, of Cedar Rapids, Iowa, and the latter's insurance carrier, Iowa Mutual Liability Insurance Company. The employee was a traveling salesman of general office supplies under the contract with the employer, hereinafter called "Corporation," and was required to furnish his own automobile in the performance of his duties and to operate it at his own expense. His average compensation in commissions exceeded $22.50 a week.

While traveling toward Omaha on highway 30, about 6:30 p. m., August 21, 1937, the automobile driven by employee collided with a truck at Johnson's corner, about seven miles southeast of Fremont, and he was fatally injured, dying the same evening.

Plaintiff alleged in her petition that the accident arose "out of and in the course of" her husband's employment

and other facts necessary to recovery of compensation under the workmen's compensation law. Comp. St. 1929, sec. 48-101.

Defendants admitted the accident, resulting injury and death; denied other allegations of the petition; pleaded affirmatively, among other defenses, that the employee was on a mission of his own at the time of the accident, and that it did not arise "out of and in the course of" his employment by the corporation, compensation, therefore, not being recoverable. Comp. St. Supp. 1939, sec. 48-152.

The cause was first heard before a judge of the compensation court who disallowed compensation on the ground that the injury was not compensable because the employee, on his own initiative, had left his line of duties in the course of his employment and was pursuing purposes of his own at the time of the accident, within the meaning of the compensation law. Comp. St. Supp. 1939, sec. 48-152. On a hearing before the three judges of the compensation court, the same conclusion was reached. On appeal to the district court the decision was the same. Plaintiff appealed to the supreme court.

Counsel for plaintiff take the position that the only legal question involved is whether the accident resulting in the death of employee arose out of and in the course of his employment by the corporation and they confidently assert he was then "at work connected with and incidental to his employment as traveling salesman," within the meaning of the workmen's compensation law liberally construed. These propositions were argued at length from the standpoint of plaintiff, with references to the evidence and precedents.

Liberal construction of the workmen's compensation law to give effect to its purpose is a rule too well settled to admit of controversy, but the statute cannot be liberalized by judicial interpretation to allow noncompensable claims. By a long line of decisions the law on the burden of proof has been held to be as follows:

"Burden of proof rests upon plaintiff, in cases arising under workmen's compensation law, to prove with reason-

able certainty that the employee met with an injury or death in an accident arising out of and in the course of his employment." *Porter v. Brinn-Jensen Co.*, 131 Neb. 611, 269 N. W. 96, and cases cited in opinion. Comp. St. 1929, sec. 48-101.

The statutory clause, "Personal injuries arising out of and in the course of employment," has been declared by the legislature "not to cover workmen who on their own initiative leave their line of duty or hours of employment for purposes of their own." Comp. St. Supp. 1939, sec. 48-152.

In support of the allegation that the accident and resulting injury and death arose out of and in the course of the employment, plaintiff testified in substance that she and her husband had been residing at Grand Island and that the territory assigned to him by his employer had been canvassed from his headquarters there; that his territory had been previously changed from time to time, requiring a corresponding change of residence; that in a conference between employee and Leo Lefebure, an officer of the corporation, at which plaintiff was present, it was agreed there should be a reassignment of territory with headquarters at Omaha and that employee should move to that city; that the general manager of the corporation had so directed by letter; that her husband informed her by letter from Omaha Saturday, August 14, 1937, that he would be in and out of Omaha all week making lists of customers and opening up territory; that he called her by telephone Thursday, August 19, 1937, and directed her to come to Omaha on a night train Saturday, saying they could look for an apartment Sunday; that before she left Grand Island, the manager of the Koehler Hotel, where she and her husband resided, informed her that her husband had been killed; that she went to the scene of the accident and there saw the supplies and equipment used by him in his salesmanship, which were always in his car when on duty in his territory. Minute details of the testimony outlined appear in the record. The evidence shows conclusively that employee was traveling on the highway toward Omaha in his own car, driven by him-

self, on a trip from Columbus, when the fatal accident occurred.

An officer of the corporation admitted on the witness-stand that a new assignment of territory and a change of residence and of headquarters to Omaha had been subjects of conversation and correspondence, but denied that an agreement to that effect had been concluded, owing to the refusal of employee to abandon Ord and other parts of his Grand Island district. The existing contract had not been changed in writing, but there was testimony tending to prove that a former oral understanding as to new territory had been reduced to writing at a later date.

In support of the defense that employee on his own initiative left his line of duty under his employment for purposes of his own and was pursuing those purposes at the time of the accident, the corporation adduced evidence of the following facts: It was the duty of employee to make weekly route sheets on Sunday or Monday advising the corporation where he could be contacted. Sunday, August 15, 1937, he reported a route sheet stating he would be working in and around Omaha until Thursday night when he would start for Ord. His register of places and dates indicated: Friday, Ord, care of Ord Quiz; Saturday, Greeley and Madison; Sunday, Norfolk, care of Norfolk Hotel. Thursday, August 19, 1937, he sent the following telegram from Omaha to E. D. Greedy, General Manager of the corporation:

"Letter regarding territory received today. Answering tonight. Desirous of leaving here tomorrow morning for Columbus and Ord. Due to unusual expenses explained in my letter finances are low. Please send my check today to reach me care Castle Hotel, Omaha, Friday morning. Large order at Ord."

As requested, a check for $40 was sent to employee at Omaha. The evidence shows that he was in Columbus about noon Saturday, August 21, 1937, and at that hour called upon a young woman named Maryann Theewen, a friend, at her room in the Meridian Hotel. He had known her for

about three years. She had a sister in Omaha and they arranged for a trip together in his car to Omaha in the afternoon with the understanding that they would return to Columbus Monday morning and bring the sister with them. This friend of employee was called to the witness-stand by plaintiff and her testimony tends to prove the following facts: She and employee had lunch together Saturday afternoon, August 21, 1937, at the Oxford Café, Columbus, talked and smoked there for perhaps an hour. She had one bottle of beer. Then they started for Omaha, but stopped at the Night and Day Café, Columbus, where he telephoned to a customer in Ord, saying he was sorry he would be unable to be there Saturday, but would see him Monday. They again started for Omaha and drove to Schuyler, but stopped at the Gateway Café, where beer was sold; went on to North Bend, where employee drank a glass of beer. At Fremont they both drank beer.

The evidence shows further that employee, at Fremont, in a café, offered to bet that his car would be wrecked on the way to Omaha. They arrived at Johnson's corner, where employee's car collided with a truck about 6:30 the same afternoon. They had been approximately four hours on their way from Columbus to Fremont, a distance of 50 miles. There is no evidence that he transacted any business for his employer on the trip or that he used the supplies or equipment in his car for any purpose during the afternoon. He did not report any orders to the corporation during the week he had spent in Omaha. He had not been directed by his employer to turn back for Omaha on his way to Ord. The only proper finding on the controlling question presented by plaintiff herself is that employee, on his own initiative, left his line of duty under his employment for purposes of his own and pursued those purposes to his injury and death. The injury of plaintiff, therefore, was not compensable under the workmen's compensation law and the compensation court and the district court did not err in so finding.

AFFIRMED.

SARAH BATTH, INTERVENER, APPELLEE, V. METROPOLITAN LIFE INSURANCE COMPANY, APPELLANT.
290 N. W. 902

FILED MARCH 15, 1940. No. 30699.

1. **Appeal.** "When a law action is tried to the court, findings of fact have the same effect as findings of a jury and will not be set aside unless clearly wrong." *Linch v. Berggren*, 135 Neb. 530, 282 N. W. 528.
2. **Death.** "A presumption of death arises from the continued and unexplained absence of a person from his home or place of residence for seven years, where nothing has been heard from or concerning him during that time by those who, were he living, would naturally hear from him." *Holdrege v. Livingston*, 79 Neb. 238, 112 N. W. 341.
3. **Appeal.** The trial being had to the district court without the intervention of a jury, the trial court is presumed to have rejected and disregarded all incompetent and improper proof, and the only question presented by the record is whether its findings and judgment are predicated upon sufficient and pertinent evidence.
4. **Evidence** examined, and *held* ample to support the findings and judgment of the trial court.

APPEAL from the district court for Douglas county: JOHN W. YEAGER, JUDGE. *Affirmed.*

Harley G. Moorhead and *Emmet S. Brumbaugh*, for appellant.

Abrahams, McGrath & Frenzer and *Monsky, Grodinsky, Marer & Cohen, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

EBERLY, J.

This is an action at law upon four policies of life insurance, in which the assured was William Batth. Batth disappeared from Omaha, Nebraska, where he had previously resided, in 1926. The petition of plaintiff in intervention alleges, in substance, in addition to the due issuance of the policies in suit, and the full payment of premiums thereon,

that on or about the 26th day of September, 1926, William Batth left his home in Omaha, Nebraska; that since said date plaintiff has not heard from him; that diligent search has been made for him without success; that by virtue of his unexplained absence for a period of more than seven years the death of said assured is established. To this petition the defendant company filed its answer, in effect taking issue with the allegations of the petition so far as the alleged unexplained absence of William Batth was concerned. A jury was thereupon waived by the parties, a trial to the court was had, and evidence was adduced by each of the parties in support of the various contentions. On consideration of this proof, there was a finding and judgment entered by the court in favor of plaintiff and against defendant as prayed, and from the judgment of the district court overruling its motion for a new trial, the defendant company appeals.

As to the law of the case, we are quite agreed that, when a jury is waived by the parties, and a law action is tried to the court, its findings of fact have the same effect as the findings of a jury and will not be set aside unless clearly wrong. *Linch v. Berggren,* 135 Neb. 530, 282 N. W. 528; *Bank of Roca v. Meyer,* 135 Neb. 128, 280 N. W. 449; *Hole v. Hamp,* 134 Neb. 259, 278 N. W. 480; *Nelson v. Nelson,* 133 Neb. 458, 275 N. W. 829.

The real issue to be determined in this appeal is the applicability of the principle early adopted by this court in the case of *Holdrege v. Livingston,* 79 Neb. 238, 112 N. W. 341, in the following language: "A presumption of death arises from the continued and unexplained absence of a person from his home or place of residence for seven years, where nothing has been heard from or concerning him during that time by those who, were he living, would naturally hear from him." See, also, *Fredrikson v. Massachusetts Mutual Life Ins. Co.,* 126 Neb. 240, 252 N. W. 802; *Munson v. New England Mutual Life Ins. Co.,* 126 Neb. 775, 254 N. W. 496; *Wells v. Equitable Life Assurance Society,* 130 Neb. 722, 266 N. W. 597.

It also follows that, in the instant case, the trial being had to the district court without the intervention of a jury, the trial court is presumed to have rejected and disregarded all incompetent and improper proof, and the only question presented by the record is whether its findings and judgment are predicated upon sufficient and pertinent evidence. *Bolin v. Fines,* 60 Neb. 443, 83 N. W. 740.

In this connection, it is to be observed that, in so far as the weight of evidence is dependent upon the credibility of the witnesses from whom it is derived, where conclusions supported thereby are or may be conflicting, the trial court, as to witnesses testifying in its presence, has an undoubted advantage in evaluating the testimony so received.

On the question of whether the record in the instant case adequately supports the presumption of death arising from more than seven years unexplained absence from his home, where nothing has been heard from or concerning him during that time by those who, were he living, would naturally hear from him, there can be no doubt but that William Batth left Omaha in the fall of 1926, and, excepting one letter in April, 1927, from Sioux City, Iowa, addressed to a friend in Omaha, wherein he stated that if he could get back his job he wanted to come back (to Omaha), nothing has ever been heard from him up to the time of the trial in the district court in November, 1938, a period of more than eleven years. Prior to his disappearance he had lived in Omaha and Council Bluffs, Iowa, since at least in 1913. On January 13, 1920, he was married to Sarah Batth. To this union two children were born. The family then lived at 2208 North 17th street, and from thence they moved to 2717 Miami street, where they remained about seven years. From the last address the family moved to 2208 North 30th street where, at the time of the trial in the district court, they had resided for seventeen years. Premiums had been paid by Sarah Batth on the policies in suit up to May 29, 1934. The record discloses that in July, 1926, Sarah Batth instituted divorce proceedings against her husband, in which an order for alimony was entered on July 19, 1926. On this

order the Union Pacific Railway Company, by whom William Batth was then employed, was "garnished." However, this matter was compromised by the parties and the garnishment proceedings were dismissed on the 9th day of August, 1926.

Mrs. Batth testified as follows: "Q. When did you last see Mr. Batth? A. It was the 26th day of September, 1926. Q. And where did you see him? A. When he called me and told me to come down, he was going to get the boy some new clothes, overcoat and shoes. Q. And did you go down-town? A. Yes; I did. Q. And where did you meet him? A. I met him about 15th and Douglas. Q. And where did you go? A. We went to a clothing company by the name of Beddeo's. * * * Q. Did he buy some clothes for the boy? A. Yes; he did. Q. Who paid for them. A. Mr. Batth. * * * Q. Now, have you seen him since that date? A. No; I haven't." She never heard from Batth thereafter, nor anything in connection with him, except for a newspaper clipping containing an account of the death of a William Batth at Sioux City, Iowa. The evidence indicates that William Batth had an abiding affection for his children.

John Barker, who first met William Batth in 1913, testifies that they were friendly until insured's disappearance in 1926, which witness explains in this manner, viz.: "Yes; (we were) just the same as brothers; he had no relations here and I didn't; we were taken up together, just like brothers." This witness also testifies that he saw William Batth just before he left Omaha in 1926; that he (Batth) "had got laid off the night that he left here. * * * He told me he had lost his job and he was going to Sioux City to see if he couldn't get work up there; he had been working there before." In April, 1927, witness received a letter from William Batth from Sioux City, and the substance of this letter was, "If he (Batth) could get his job back, he wanted to come back." Further, "A year after Hoover got elected," the witness "come back from the east," and saw a newspaper clipping which reported the death of a William Batth at Sioux City, Iowa.

With the exception of the letter in April, 1927, and the newspaper clipping referred to, William Batth was never thereafter heard from.

The record also discloses that Mrs. Batth secured the making of an extensive search by a Mr. Williams, wholly without results.

True, in opposition to this proof, we have the testimony of a witness introduced by the defendant, as to a conversation claimed to have been had between the witness and William Batth some 30 days prior to Batth's departure in 1926, in which the latter expressed the intention that he was going to quit his employment to keep from paying alimony to his wife, and was going to Oklahoma where he had an uncle living, "and was going to not write or keep relationship with anybody in Omaha, wasn't going to write to any one or let any one in Omaha know where he was." Further, that Batth "quit" his employment and left some thirty days thereafter. Incidentally, the records of Batth's employer, assuming their competency, disclose that William Batth did not "quit" his employment, but that he was "discharged" by his employer.

At most, the evidence of defendant's witness amounts to conflicting proof, the probative force of which is to be largely determined as a question of credibility of witnesses. The trial court, by its findings and judgment, determined this question adversely to the defendant. We find no reason in this record for overthrowing this judgment.

Viewing the evidence as an entirety, in the light of the judgment of the trial court, we find that the case presented is one clearly entitled to the benefit of the presumption of death after more than seven years of unexplained absence. The proof is ample to support the judgment of the district court, which is

AFFIRMED.

PETER REDWELSKI, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.
290 N. W. 904

FILED MARCH 15, 1940. No. 30745.

Trial. Where the evidence was insufficient to sustain a judgment in favor of the plaintiff, who was injured in a collision while driving his automobile, it was the duty of the trial court to sustain a motion directing a verdict for defendant at the close of plaintiff's evidence.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Affirmed.*

Gordon Diesing, for appellant.

Kennedy, Holland, DeLacy & Svoboda, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

PAINE, J.

This is an action for personal injuries sustained by the plaintiff, who was driving his own car and collided with a repair truck owned by the street railway company. At the close of the plaintiff's case, the trial court sustained defendant's motion for a directed verdict in its favor, and dismissed the plaintiff's action.

The assignments of error set out that the trial court was in error in refusing to submit the case to the jury, and that the dismissal of the case is contrary to the evidence and the law; that the court erred in passing upon the credibility of the witnesses, which is the sole duty of the jury, and thereby invaded the province of the jury.

This is a companion case to *Blank v. Omaha & C. B. Street R. Co., ante*, p. 632, 290 N. W. 464, which case was presented first to this court, Blank being a guest of the plaintiff at the time of the accident.

The accident happened at about 8 o'clock on the evening of February 26, 1938. The plaintiff was chief engineer of the Schulze Baking Company, and left his home in his 1934

Chevrolet car to make a trip to the bakery to give directions about heating the ovens. It was a dark, cloudy night, but his headlights, adjusted for city driving, would shine about 50 feet ahead of his car. The trolley wire had broken, and was looped around a stalled street car, and a repair truck, with a tower from which workmen could reach the trolley, had arrived, and turned around in the intersection of Woolworth avenue and Twenty-fourth street, and headed back north up Twenty-fourth street, and was lengthwise of the street car tracks and parallel therewith, its left wheels being to the west of the west rail of the south-bound track. This truck had been engaged there for about 15 minutes. After its headlights were turned off, a man with a flashlight stood in front of the truck and gave orders to the repair crew on the tower of the truck, and directed traffic.

The plaintiff testified that he had full control of his car, was looking straight ahead, and that when his headlights disclosed the truck ahead of him he was scared and frightened, applied his brakes, and just then the truck's headlights flashed on and blinded him; that he turned his car to the right to avoid a head-on collision, and the left wheel and fender of the Chevrolet hit the left wheel and fender of the truck. Plaintiff testified that his brakes were in good condition, and also his lights. Plaintiff was knocked unconscious by the collision, and remained in a hospital for 16 days and six or seven weeks in his home with a fractured skull.

At the corner of this intersection of Twenty-fourth street and Woolworth avenue, there was a filling station on the southeast corner and a grocery store on the southwest corner. Der Merkley testified that he helped out at this filling station on the corner; that the tower repair truck and also the street car which was standing there, with the broken trolley wire around it, were both painted yellow. He testified that there was a light at the top of each of the three pumps at the filling station, and four lights around the building, and one floodlight on a pole out by the sidewalk, and all were lighted at the time of the accident; that

the arc light on the southwest corner was burning. He could see the men working on top of the tower of the truck; he could see the man 10 feet ahead of the truck when it was 15 or 20 feet north of the intersection, or a distance of 56 feet from where the witness stood. He looked up the street from the door of the filling station and could see the truck standing there. This witness also said there was a dim light in the grocery store on the southwest corner, which was disputed by other witnesses.

Mitchell Vosik testified that he was in charge of the filling station on the evening of the accident; that the street car was stopped on the west side of the street in front of the Woolworth grocery run by Nussrallah; that the broken trolley wire was looped over the east end of the street car, and the north end of the trolley wire was lying in the street; that it threw up blue flames and crackled; that the repair truck came, and headed north under the wire, moved very slowly, with a man on the ground giving orders to the men up on top.

Witness Floyd Johnson testified that he was night engineer at the Bond Bakery, and was a friend of the plaintiff; that he had traveled south on Twenty-fourth street, and when he arrived at the middle of the block between Poppleton and Woolworth avenues he saw a man jump out from the side of the curb with a flashlight, signaling him to turn to the left; he was 35 or 40 feet from the truck when his headlights picked up the truck. He saw the man with a flashlight 100 or 125 feet away from him; he could not tell the color of the truck; he could not see that it was a truck until he went by it.

There was plenty of room for plaintiff's Chevrolet to go on the west side of this repair truck, but instead of that it appeared to come down the south-bound track, and although plaintiff claimed his brakes were in good order, and that his speed was only 25 miles an hour, yet he drove into the truck at a speed sufficient to damage both motor vehicles, and he received serious personal injuries.

The evidence of the plaintiff clearly discloses that this

corner and the objects there were so well lighted that several witnesses testified to all that was being done there, and the plaintiff himself testified that he saw this truck when he was at least 50 feet away, and that his brakes had been tested by the city and were in good working order; that his windshield was clear, and that he could have stopped his car within 35 to 40 feet. The testimony further shows that he could have avoided the accident if he had turned his car one or two feet farther to the west, and could have gone around the standing truck in safety.

At the conclusion of the plaintiff's testimony, defendant moved the court for an order dismissing the plaintiff's cause of action, for the reason that the said plaintiff has not proved sufficient facts to constitute a cause of action against the defendant, and for the further reason that by the plaintiff's testimony in this case the testimony shows that the plaintiff was guilty of negligence sufficient to bar the plaintiff from any recovery against the defendant. This motion was argued to the court, taken under advisement, and the next day the court discharged the jury and sustained the motion, the evidence clearly supporting the court in this ruling.

The first syllabus in *Hendren v. Hill*, 131 Neb. 163, 267 N. W. 340, reads as follows: "It is the duty of an automobile driver, in driving a car in the night-time, to keep such an outlook ahead that he will see an obstruction as soon as it is illuminated by his lights, and it is his duty to have his car under such control that he can stop to avoid a collision with an object within the area lighted by his lamps."

It may be admitted that, if reasonable men would draw different conclusions from the evidence, then the question of negligence is for the jury. *Hardung v. Sheldon*, 133 Neb. 427, 275 N. W. 586.

However, this court is committed to the doctrine by many decisions that it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his headlights. *Roth v.*

Blomquist, 117 Neb. 444, 220 N. W. 572; *Anderson v. Lee*, 130 Neb. 258, 264 N. W. 666. Annotations on this subject will be found in 87 A. L. R. 900 and 97 A. L. R. 546.

In the case at bar, it must be held that the evidence is insufficient to sustain a judgment in favor of the plaintiff, and that the trial court was right in discharging the jury and dismissing the petition. *Most v. Cedar County*, 126 Neb. 54, 252 N. W. 465.

In our opinion, the trial court properly directed a verdict for the defendant at the close of plaintiff's evidence, and such judgment is hereby affirmed.

AFFIRMED.

SIMMONS, C. J., and CARTER, J., concur in the result.

WILLIAM R. WOOD, APPELLANT, V. CHARLES H. BURKHARDT ET AL., APPELLEES.

291 N. W. 98

FILED MARCH 15, 1940. No. 30785.

Record examined, and held to warrant only $740 rent as an offset. As thus modified, decree affirmed.

APPEAL from the district court for Cheyenne county: J. LEONARD TEWELL, JUDGE. *Affirmed as modified.*

Golden P. Kratz and *C. S. Wortman*, for appellant.

R. P. Kepler, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

PAINE, J.

In a foreclosure action upon a house and lot in Sidney, Nebraska, a counterclaim for rent was filed by the defendants for an offset in the amount of $2,095.20. District judge found $2,483.18 due on the mortgage, and decreed foreclosure, and allowed $1,233.18 as the offset. Plaintiff appealed.

Plaintiff filed petition for the foreclosure of a mortgage, dated June 10, 1925, due in five years, signed by Elizabeth Burkhardt, who has since died, and the defendant Charles H. Burkhardt, her husband. The mortgage was in the

amount of $1,600, for 7 per cent. interest until maturity and 10 per cent. thereafter. The mortgage was secured on lot 10, block 1, Clarkson's addition to Sidney, Cheyenne county, Nebraska.

The petition recites that three payments, totaling $350, were made upon the principal, and four payments made on the interest; that the mortgagors permitted the taxes to become delinquent for the years 1934, 1935, and 1936, and after they were advertised the plaintiff purchased a treasurer's tax certificate for said taxes, paying therefor the sum of $237.10. Foreclosure is brought for $1,250, balance of the principal on the note, with 10 per cent. interest, and upon the tax certificate, together with $73.75 subsequent taxes paid for the year 1937, and that, upon failure of the defendants to pay the sums found due, with interest, the property be sold. Later a supplemental petition was filed, setting up that the plaintiff had paid $17.76 as the premium on an insurance policy, which additional sum, with 10 per cent. interest from January 7, 1939, he demands to be paid as a part of the mortgage foreclosure.

The answer filed by Charles H. Burkhardt and the children of his deceased wife, as defendants, admits the giving of the mortgage, denies the amount due thereon is correctly stated in plaintiff's petition, and for a counterclaim states that the plaintiff lived in the premises and occupied a room in the basement, which was supplied with heat, light and water, and that the reasonable value of the rental was $7.50 a month from July 1, 1920, to October 17, 1938, and that the rental due therefor is $1,661.45. Defendants further allege that, immediately after the death of the wife, plaintiff was placed in possession of one additional room, with storage space in a third room, with heat, light, and water, which he continued to use from December 23, 1933, to the 17th day of October, 1938, and that the space so occupied was worth $7.50 a month in addition to the rental for the first room hereinbefore set out, and that for such additional space he owes the full sum of $433.75, or in all the plaintiff is indebted for room rent in the sum of $2,095.20, for which

amount defendants pray judgment, together with 6 per cent. interest from October 17, 1938, and costs. The reply was a general denial.

The decree entered by the trial court found that the amount due upon said mortgage and upon said tax sale certificate, and the premium on the insurance policy purchased, with interest on the several items, amounted to the full sum of $2,483.18. The court further found that the amount due from the plaintiff as rent for the rooms occupied by him in the mortgaged premises is $1,233.18, which should be set off and deducted from the amount due on the note and mortgage, and directed that in default of the payment of the balance of $1,250, the difference between the two, the property be sold.

The errors relied upon for reversal by the plaintiff were based upon the improper admission of evidence and improper refusal of evidence offered by plaintiff, and the argument was devoted to the fact that the allowance made on the counterclaim for rent was greatly excessive under the evidence.

There appears to be no dispute on any legal proposition between the parties. The evidence shows that Mrs. Burkhardt endeavored to take care of the payments due on the note and mortgage so long as she lived, but that after her death nothing more was paid, and the taxes were allowed to become delinquent. The property stood jointly in the name of Mr. and Mrs. Burkhardt, and she was his second wife.

There is nothing in the decree which gives any clue whatever as to how the court arrived at the offset of $1,233.18 allowed for rent of the premises occupied by Mr. Wood, and therefore it is necessary to examine the entire evidence in relation to that matter. This appears to be an ordinary one-story house, with full basement. Plaintiff occupied the northeast room in the basement, size 10 by 14 feet, and after Mrs. Burkhardt died Mr. Burkhardt moved down into the basement too, so he could rent the entire upstairs, and they built beaver-board walls to make a small room, about

8 by 10 feet, in the southeast corner in the basement, similar to the one occupied by Mr. Wood. This left a larger room between these two rooms, into which the defendant moved his furniture from upstairs. This third room in the basement was occupied by the tenants of the basement jointly, as there was a stove and cupboards and dishes available to either, although it is not shown that plaintiff made much use of the middle room, and he had a key to the other bedroom, and kept a trunk and other things in there at times. The whole upstairs of the house and the west half of the basement were rented by Burkhardt for $20 a month. Mr. Burkhardt on the witness-stand said he asked $15 a month for the two rooms occupied by the plaintiff after the wife died.

We have no clue whatever to the method by which the trial judge arrived at the amount of $1,233.18 rent as an offset to be credited upon the amount due plaintiff on the mortgage. However, the trial court finds in its decree that plaintiff was not indebted to the defendants for anything prior to December 22, 1933, which was the date of the death of the wife, Elizabeth Burkhardt.

Plaintiff occupied the rooms in the basement up to October 17, 1938, which would be a period of approximately four years and ten months, and without considering any interest for these unpaid rents due monthly, it would amount to an allowance of over $21 a month for rent, which is too much when the entire upstairs of this house rented for but $20 a month.

The court is convinced that $740, including interest to March 15, 1939, the date of the decree, would be ample rent for the accommodations used by the plaintiff in the basement.

This court finds that plaintiff is indebted to the defendants for rental on that portion of the basement rooms occupied by plaintiff in the sum of $740, which amount should be set off against the amount found due on plaintiff's note and mortgage. As thus modified, decree is affirmed.

AFFIRMED AS MODIFIED.

EFFIE M. LUND, APPELLEE, V. ELIZABETH WOODWARD ET AL., APPELLEES: WILBURN W. EVANS ET AL., APPELLANTS.
291 N. W. 90

FILED MARCH 15, 1940. No. 30744.

1. **Deeds**: SETTING ASIDE: BURDEN OF PROOF. In a suit to set aside a conveyance of real property for want of mental capacity on the part of a grantor, the burden of proof is upon the party alleging it to establish that the mind of the grantor was so weak or unbalanced when the conveyance was executed that he could not understand and comprehend the purport and effect of what he was doing.
2. ———: ———: UNDUE INFLUENCE. Undue influence sufficient to avoid a conveyance of real property is such an unlawful and fraudulent influence which controls the will of the grantor.

APPEAL from the district court for Wayne county: ADOLPH E. WENKE, JUDGE. *Affirmed.*

Huber D. Addison and *Sidney T. Frum,* for appellants.

Harry E. Siman, Fred S. Berry, Burr R. Davis and *McKenzie & Dugan, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

CARTER, J.

This is a suit brought by Effie M. Lund to obtain a partition of a quarter-section of Wayne county land of which she claims to be the owner in fee simple of a one-fifth interest. The appeal is prosecuted from a decree ordering a partition of the land.

The record shows that in 1890 Frank O. Hildur married Mary E. Evans, a widow with five children, one of which is the plaintiff in this case. At the time of her marriage to Hildur, Mary E. Hildur was the owner of the land involved in this suit. In 1893 she conveyed the east half of the quarter to her husband, Frank O. Hildur. On July 18, 1935, she conveyed the west half to her husband and her children or their representatives, as the case may be, reserving to herself a life estate in the property. On December 17,

1937, Frank O. Hildur deeded all of his interest in said land to Mary E. Hildur for life with a remainder over to her children or their representatives, as the case may be. By virtue of these two deeds, if valid, the plaintiff, Effie M. Lund, and the defendants, Elizabeth Woodward, Wilburn W. Evans and Leona Pickerel, each became the owner of an undivided one-fifth interest in the land, and Addie F. Boileau, Wilburn Hauser, Samuel A. Hauser and Ella Hanson each became the owner of one-twentieth interest therein, all subject to the life estate of Mary E. Hildur. The life estate was terminated by the death of Mary E. Hildur on March 9, 1938.

During the course of the probate of the estate of Mary E. Hildur, claims were filed against the estate in excess of $2,000. There are no assets in the estate except the interest Mary E. Hildur may have had in the real estate involved here. The will of Mary E. Hildur left her estate, except for some small legacies, to Wilburn W. Evans, her son. The decision of the case therefore rests upon the validity of the deed of Mary E. Hildur to Frank O. Hildur dated July 18, 1935, and the deed of Frank O. Hildur to Mary E. Hildur and her heirs dated December 17, 1937.

It is contended that Mary E. Hildur was incompetent on July 18, 1935, the date she executed a deed to the west half of the quarter-section to her husband and children, subject to a life estate in herself. The evidence shows that Mary E. Hildur was 95 years of age when the deed was executed. It also shows that a guardian was appointed for her on or after July 20, 1935. Defendants called lay witnesses who testified in substance to Mary E. Hildur's physical handicaps and to a general decline of her mental faculties, especially as to a tendency toward forgetfulness. From this evidence several lay witnesses gave as their opinions that Mary E. Hildur was incompetent on the date the deed was given. Her attending physician was the only medical expert who testified and he did not state that he thought she was incompetent. Other lay witnesses were called by the plaintiff, who testified to long associations with Mary E. Hildur

up until the time of her death, and gave it as their opinion that she was not incompetent on July 18, 1935. There can be little doubt that Mary E. Hildur was weakened physically and mentally because of her advanced years. That she should become forgetful is more or less natural. This is not, however, sufficient to show that at the time of the execution of the deed she was incapable of a reasonable comprehension and understanding of what she was doing. Unless it was established by defendants that she lacked such an understanding, the conveyance will be upheld. *Blochowitz v. Blochowitz*, 122 Neb. 385, 240 N. W. 586.

There is no presumption that a person of advanced years is incapable of transacting business. The burden is upon the plaintiff to establish that fact. While great age is an important and pertinent circumstance to be considered in connection with the other evidence going to the question of mental competence, it cannot be treated as controlling. The law recognizes the right of the aged to control and dispose of their own property and their right to choose the persons who shall be the recipients of their bounty. It has long been recognized, and the world is full of proof, that the ability to think and reason clearly may alone survive the passing of youth and middle age. The evidence of defendants, in our opinion, even if undisputed, was not sufficient to deprive Mary E. Hildur of that right by a finding that she was incompetent on July 18, 1935, when the deed was executed and delivered. See *Leonard v. Shane*, 182 Ia. 1134, 166 N. W. 373. The record is barren of proof of duress or fraud being practiced upon Mary E. Hildur. The allegations of the answer in that respect were not therefore established.

It is next contended that the deed given by Frank O. Hildur to Mary E. Hildur on December 17, 1937, was procured by fraud, duress and mistake. The evidence shows that Frank O. Hildur had held the title to the east half of the quarter-section involved here since 1893. He also acquired title to one-fourth of the west half subject to the life estate of Mary E. Hildur, by the deed of July 18, 1935, heretofore discussed in this opinion. It is apparent that

some of the children of Mary E. Hildur were demanding that this real estate should be conveyed back to Mary E. Hildur and her heirs in view of her advanced age. With this in view, the guardian of Mary E. Hildur held numerous conferences with Frank O. Hildur with reference to the rights of Mary E. Hildur in the land, with the result that Hildur offered to deed a life estate in the land to Mary E. Hildur, and the remainder to her heirs in the proportions hereinbefore set out. The evidence shows that Hildur was urged by the lawyers handling the matter for the guardian and the heirs of Mary E. Hildur to get legal advice of his own choosing in order that he would thoroughly understand what he was doing. The deed was read to him a number of times and he read it himself. At the time the guardian submitted the offer to the county judge of Wayne county for approval, the county judge carefully examined Hildur with reference to it and urged him to consult his own legal counsel. The answer of Hildur was that he understood the offer thoroughly and that it was just as he wanted it. The offer was thereupon approved by the county court and the deed drawn, executed and delivered in accordance therewith. The evidence of Hildur that he thought he was conveying the whole title to Mary E. Hildur does not seem the least impressive to us after a consideration of all the circumstances. The efforts of counsel in attempting to preclude any future attempts to invalidate the conveyance by explaining its effect to Hildur, in making a full and complete disclosure to the county judge of Wayne county at the time it was submitted to him, and in urging Hildur to consult his own attorney to make certain that a complete understanding had been reached, not only show exemplary professional conduct on the part of the lawyers involved, but also preclude Hildur from claiming that he was in any way defrauded or subjected to duress and coercion. The evidence not only shows that no mistake was made, but that Hildur insisted that the offer and the deed made pursuant thereto be in the exact form in which they now appear. We necessarily conclude that the deed from Frank O. Hildur to Mary E. Hildur

under date of December 17, 1937, is in all respects valid as against the defenses set out in the answer of the defendants.

The decree of the trial court ordering a partition of the lands involved was in all respects correct and is

AFFIRMED.

BERTRAND HENDERSON, APPELLEE, V. GLEN R. WILSON ET AL., APPELLEES: BOLUS J. BOLUS, TRUSTEE, APPELLANT.
291 N. W. 96

FILED MARCH 15, 1940. No. 30873.

1. **Workmen's Compensation:** APPEAL. In an appeal from an award of the compensation court, after a rehearing before the whole court, the filing of the petition and transcript in the district court within the fourteen-day period fixed by the statute lodges jurisdiction of the case in the district court.
2. ———: ———. No præcipe need be filed nor a copy of the petition served in the district court to give it jurisdiction of a compensation case appealed from an award of the whole compensation court on rehearing.
3. ———: ———. The compensation law imposes on the clerk of the district court the duty of issuing a copy of the petition for service on the adverse party within seven days in an appeal from an award of the compensation court sitting *en banc* on rehearing. The failure of the clerk of the district court to so do does not deprive a litigant of his right of appeal.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Reversed.*

Bolus J. Bolus, pro se.

Hamer, Worlock, Randall & Tye, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

CARTER, J.

This is a proceeding under the workmen's compensation law in which the trial court dismissed the appeal from the

compensation court on the ground that jurisdiction was never obtained. It is from this order that an appeal was taken to this court.

It appears that plaintiff filed his application in the compensation court to obtain an award of benefits for injuries suffered while in the employ of defendants, the owners and trustees of the Wilson Freight Line. After a trial before one of the three judges of the compensation court, an award to plaintiff was entered. Upon a rehearing before the three judges of the compensation court, plaintiff was again awarded compensation. From this award defendant Bolus appealed to the district court.

The record shows that the final award of the compensation court was entered on July 3, 1939. On July 11, 1939, there was filed in the compensation court a notice of election to appeal. On July 13, 1939, appellant filed his petition praying for a reversal and modification of the award made by the compensation court. Also, on July 13, 1939, appellant filed a præcipe for summons. Summons was issued on July 21, 1939, and returned showing service thereof on July 22, 1939. On the record the trial court sustained a motion to dismiss the appeal.

It is the contention of appellee that, in an appeal from an award made by the three judges of the compensation court, a copy of the petition filed in the district court must be served in the manner that a summons is served in the first instance. The applicable part of the statute provides: "Within seven days after the filing of such petition on appeal, a copy thereof shall be served upon the adverse party in the same manner as summons is served as provided in section 13, subdivision (2) hereof and return of service shall be made within five days thereafter." Comp. St. Supp. 1939, sec. 48-174.

An appeal from an award of the compensation court sitting *en banc* is complete when a petition and transcript are filed in the district court within the fourteen days allowed by the statute. Comp. St. Supp. 1939, sec. 48-174. The duty of serving a copy of the petition upon the adverse

party within seven days after the filing of the petition is imposed on the clerk of the district court. The requirement of a præcipe has no application to a proceeding under the compensation law. *McIntosh v. Standard Oil Co.*, 121 Neb. 92, 236 N. W. 152. It necessarily follows that, inasmuch as the defendant met all the requirements of the compensation law by filing his petition and transcript in due time, the district court obtained jurisdiction, and the failure of the clerk of the district court to carry out the duties enjoined by the compensation law, over which this defendant had no control, does not deprive defendant of his right of review in the district court. *McIntosh v. Standard Oil Co., supra*; *Hansen v. Paxton & Vierling Iron Works*, 135 Neb. 867, 284 N. W. 352.

The right of appeal is a substantial one to be sustained if possible. Technical refinements of interpretation will not be indulged in to defeat an appeal. It is only when the clearly expressed language of statutory requirements for appeal have not been met that a court will dismiss an appeal for want of jurisdiction.

We think the trial court was in error in dismissing the appeal in the instant case.

REVERSED AND REMANDED.

WALTER C. HAMPTON, APPELLEE, V. HERMAN J. WESTOVER, APPELLANT.

291 N. W. 93

FILED MARCH 15, 1940. No. 30771.

Judgment: EVIDENCE. A judgment of dismissal rendered in a criminal prosecution cannot be given in evidence in a purely civil action to establish the truth of the facts upon which it was rendered.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Reversed.*

Seymour L. Smith, Harold C. Linahan, W. W. Wenstrand, Edward Sklenicka and *Louis T. Carnazzo*, for appellant.

George Evens and *Mossman, Anderson & Meissner, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

The plaintiff brought this action to recover damages from the defendants for injuries received by him arising out of a claimed assault and battery by the defendant Herman J. Westover, a policeman of the city of Omaha. The jury returned a verdict for the plaintiff in the sum of $400. A remittitur of $100 was requested and filed, leaving the judgment in the amount of $300, and from this judgment defendant Herman J. Westover appeals.

The plaintiff claims that while he was employed on a Public Works project on May 28, 1937, at about 2 o'clock in the afternoon, and while he was on duty, defendant Westover, acting in the course and scope of his employment, endeavoring to execute and perform his duties as a police officer, came upon private grounds where the plaintiff was peacefully performing his duty and arrested him, and then and there, without any provocation and without any justification, intentionally, wilfully and maliciously struck, beat, assaulted and maimed the plaintiff by striking him on the head and knocking him over and down the side of a steep, stony terrace, causing injuries. For the purposes of this appeal, it is not necessary to detail the facts as disclosed by the record.

In paragraph 7 of plaintiff's amended petition, plaintiff alleged, in substance, that after he was placed under arrest and after defendant Westover had assaulted him, Westover sent for a cruiser car and officers, ordered the plaintiff to be taken to the police station, and at 9 o'clock in the morning of May 29, 1937, plaintiff was taken before a police judge and charged with resisting arrest, to which charge he pleaded not guilty. The matter then proceeded to trial. Defendant Westover appeared at the trial, testifying against the plaintiff, and after the evidence was adduced the court

entered judgment, dismissing the charge of resisting arrest. A motion was made to require the plaintiff to strike paragraph 7 from his amended petition, for the reason that the same was redundant, scandalous and irrelevant. This motion was overruled by the court. In the overruling of this motion the defendant contends the court erred.

During the trial of the instant case, two exhibits were placed in evidence, designated as 1 and 2. Exhibit 2 charged the plaintiff with resisting arrest. This exhibit shows the filing mark and the prefix "Dis." The evidence shows that a hearing was had and that defendant Westover testified at the hearing. Objection was made to exhibit 2 for the reason that "it is incompetent, irrelevant, immaterial and has no bearing on the issues in this case. The only bearing that it might have would be a question of fact to be adduced by evidence produced before this court and the jury." Mr. Evens, counsel for plaintiff, stated during the course of the objections and in conversation with Mr. Linahan, representing the defendant, as follows: "I don't want to mislead the jury. This is just the way it is, but it says dismissed." Mr. Linahan said: "That is right." Mr. Evens replied: "And you are admitting that is the true findings?" Mr. Linahan stated: "We will presume it is." The plaintiff was asked this question: "After that was dismissed, you left the police station, Mr. Hampton? A. Yes; I did." So, for the purposes of this case, we assume that there was an order of dismissal on the charge of resisting arrest which is tantamount to a judgment of acquittal. The defendant contends that the court erred when it allowed evidence to be introduced that plaintiff was dismissed on the charge of resisting arrest.

The instructions given by the trial court, in defining the issues, did not in any manner state the substance of allegation 7 contained in plaintiff's amended petition. We will confine ourselves solely to the competency of the evidence of the dismissal of plaintiff in the police court of Omaha, on the charge of resisting arrest, and its pertinence to the instant case.

The general rule is that, in the absence of a statutory provision to the contrary, a judgment of acquittal rendered in a criminal prosecution may not be given in evidence in a subsequent civil action. This rule prevails where the judgment is offered to establish the truth of facts upon which it was rendered. It prevails where the judgment rendered in the criminal action is offered in the civil action for the purpose of proving its own existence where such existence is a material fact, in which case the judgment is conclusive as to the fact of its rendition. See 20 Am. Jur. 854, sec. 1011.

The rule supported by the great weight of authority is to the effect that a judgment of acquittal in a criminal prosecution cannot be given in evidence in a purely civil action to establish the truth of the facts upon which it was rendered. Annotation, 31 A. L. R. 262. See, also, Annotation, 57 A. L. R. 504.

Many and various reasons for the rule as to admissibility have been assigned, including dissimilarity of object, issues, procedure, degree and elements of proof, parties to the action, etc., and many cases define the foregoing. Primarily, the rule rests upon a reasoning that the two proceedings are not ordinarily between the same parties. In distinguishing between cases of a criminal nature and those of a civil nature involving the same transaction, different rules apply as to the competency of witnesses and as to the weight of testimony. The issue in a criminal proceeding is not necessarily the same as in a civil action, either as to scope or as to its attendant results. The parties are necessarily different. The civil action is prosecuted by one individual. The other action is maintained by the state or municipality. Whether such reasoning is entirely sound, we are not sufficiently convinced to be dogmatic about it. Inasmuch, however, as the principle has been recognized so often and frequently announced in many jurisdictions as an unqualified canon of the law of evidence, we feel that it is more in the interest of exact justice, if not of expediency, to err in its recognition, and to apply it here, than to repudiate it.

A more pertinent case, and one which substantially supports defendant's contention, is the case of *Lillie v. Modern Woodmen of America*, 89 Neb. 1, 130 N. W. 1004. In that case the plaintiff sued the insurance company on a policy of life insurance. The company defended on the ground that the plaintiff had murdered the insured and was therefore, under the terms of the policy, precluded from recovering the benefits thereof. Apparently, the actual facts were that the plaintiff had murdered the insured. The defendant insurance company attempted to introduce into the civil action a certified copy of the record of conviction as substantive evidence. The court held: "Evidence of the commission of the crime would depend upon the proof of the fact of the criminal act. A certified transcript of the record of conviction of the beneficiary is not admissible as substantive evidence of the facts upon which the prosecution was founded, nor of the fact of the murder of the assured by the beneficiary." The same rule would apply to the transcript of a judgment disclosing the acquittal of a party or a dismissal of a criminal proceeding against him.

We conclude that the admissibility of the evidence of which the defendant complains in this case constituted prejudicial error. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED.

MYRTLE E. SWANSON, APPELLANT, V. ARTHUR E. SWANSON, APPELLEE.

290 N. W. 908

FILED MARCH 15, 1940. No. 30696.

1. **Divorce.** With the granting of an absolute divorce, the trial court may enter decree in regard to property acquired during marriage by joint efforts of parties as justice and equity demand.
2. ———. In awarding custody of a child, the primary concern of the court in its sound discretion is the best interest and welfare of the child, having due regard of the rights of the parents.
3. **Record** examined *de novo* and decree affirmed as modified.

APPEAL from the district court for Douglas county: HERBERT RHOADES, JUDGE. *Affirmed as modified.*

Crofoot, Fraser, Connolly & Stryker and *Bert L. Dickason,* for appellant.

Leon, White & Lipp, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and FALLOON, District Judge.

FALLOON, District Judge.

This action was brought by the plaintiff, Myrtle E. Swanson, for separate maintenance, custody of the three minor children, ownership of certain property, support money and attorney fees. The defendant, Arthur E. Swanson, answered and cross-petitioned for an absolute divorce, care and custody of the three children and for determination of the title to certain property. Trial was had, taking some eleven days, producing a voluminous transcript of the evidence.

The trial court found against the plaintiff generally, that the allegations of her petition were untrue and not supported by the evidence, and found further generally for the defendant, that the allegations of his answer and cross-petition were true and supported by the evidence. The trial court further found that the plaintiff had been guilty of acts of extreme cruelty towards the defendant so that the legitimate ends of matrimony were destroyed and decreed that the defendant was entitled to an absolute divorce. The trial court further found that the welfare and best interests of the children, ages 14, 11, and 5, required that the defendant was entitled to and should be given the care and custody of the children and that they should be so placed and entrusted, with the right of visitation at reasonable times by the plaintiff, subject to further order of the trial court. The trial court further found the defendant was a fit and proper person to have such care and custody of the children, which was made immediate. The trial court further awarded the plaintiff permanent alimony in the sum of $14,400 payable at monthly rate of $100, but in event of remarriage of

plaintiff, from such time the remaining amount was halved and payable at monthly rate of $50. The trial court decreed that the defendant was to have all personal property, including the household goods, but that plaintiff was entitled to immediate possession of her personal effects. The defendant was also decreed to be the owner of the home residence and also the farm property. The alimony judgment was decreed a lien on the farm property and in addition the defendant was ordered to deposit some $7,000 life insurance policies with the clerk of the trial court as security for the payment of said judgment, but the residence was left absolutely free from said alimony lien. The trial court also awarded plaintiff's attorneys $1,500 in addition to the $100 heretofore allowed and paid. Defendant was taxed all costs except those incurred in connection with the employment by plaintiff of the three investigating detectives.

Both sides filed motions for new trial, which were overruled, and both sides have appealed to this court. This necessitates a trial *de novo* upon the record by this court.

The record discloses that the trial judge was justified in granting an absolute divorce to the defendant and in denying the separate maintenance request of the plaintiff. The testimony discloses that the plaintiff was easily disturbed, that she is of a highly nervous type, that she attempted suicide, that many times she threatened suicide, that she was given to tantrums and violent exhibitions of temperament which she did not attempt to control, making the home life of the parties and their children unbearable and not conducive to the true objects of matrimony or the raising of a family; that the plaintiff knew what she was doing, but was emotionally unstable, and that she failed to cooperate when adjustment was sought is borne out by the testimony not only of the doctors and specialists who treated her, but by the record generally. In other words, she was a badly maladjusted individual. The record discloses many false, vicious and unsubstantiated accusations of defendant by plaintiff which were unjustified and would constitute extreme cruelty within the meaning of the statute.

That parents cannot get along together is unfortunate, for there is no reason to doubt that all parents in their own way love their children and a separation creates some heartaches. To go into details in this opinion will serve no good purpose. The trial court is vested with sound discretion in determining whether a divorce shall be granted and generally an absolute divorce is to be preferred. Unjustifiable conduct which destroys the legitimate objects of matrimony warrants such a decree. A careful analysis of the whole record, without the advantage that the trial court had in observing the witnesses, and their appearance and conduct in the courtroom, warrants the absolute divorce that the trial court awarded. It is the only proper solution. In any event, this question rests in the sound discretion of the trial court and this discretion has not been abused.

To determine who should have the care and custody of the children, the court will always consider their best interests and welfare. There is no duty more delicate or responsible given to any court. At times it is most difficult, but if the decree of the trial court is justified by the evidence, its discretion will ordinarily not be disturbed.

The record discloses that the plaintiff at times was hysterical, not too careful with her language before her children, and given to frequent outbursts of temper and her emotions. She was highly nervous and at times very unstable. She was quite normal when everything went smoothly, but easily changed from one extreme to another. The uncontradicted testimony of the physicians and psychiatrists points out that this mental state of the plaintiff was not conducive to a proper home life. Her attitude before the children was not favorable to their normal development and was beginning to show in their lives. The trial judge had the best opportunity to judge what was for the best interests and welfare of these three minor children and he placed them in the custody of the father, subject to his further order. The record discloses no better solution. The welfare of these children demands the highest consideration of the court and not the desires of the parents.

It is not necessary to set out in detail nor to condense the testimony in this case, as it would serve no useful purpose, but might be embarrassing to the parties concerned, and especially the children, in the years to come. Neither is it necessary to set out the decisions of this court as to the propositions involved in the final determination of this case. Both sides have exhaustively furnished citations which have been carefully considered.

The net worth of the defendant according to the evidence was about $40,000 and his income according to his tax returns for 1937 and 1938 would average better than $1,000 a month. His present salary is $576 a month, to which should be added his commissions, dividends and rentals. The plaintiff furnished $1,000 when the first bungalow was built in 1922, about two years after their marriage. She also bought some articles in the household. The defendant had some property when married, but the testimony is not complete enough to draw an accurate conclusion in regard to this property. The home and farm properties were bought mainly through the means and efforts of the defendant, though taken in the names of both plaintiff and defendant. With these two pieces of real estate, the household goods and Cook Paint & Varnish Company stock make up the property of the parties. There is also evidence of an estate of the deceased father of plaintiff in which plaintiff has an interest. It was proper that the trial court assign this property to the defendant, as was just and equitable, and award the plaintiff alimony. The alimony of $14,400 to the plaintiff was just, and in view of all the property and income, it was proper that the payments be made as the court indicated. This court deems it inequitable that a reduction in case of remarriage by plaintiff should be made. There is no restriction on remarriage put on the defendant and there should be none on plaintiff, under all the circumstances. Her health has not been the best and this conditional reduction should not attach. The defendant at the time of the trial was 49 years of age, while plaintiff was 41 years of age. Both have had some ill health.

The trial court further in its decree exempted the residence property from the alimony lien. There appears to be no valid reason for this exemption.

The decree of the trial court will be affirmed in all particulars, with the exceptions that it should be and hereby is modified to remove the reduction in permanent alimony in case of remarriage of plaintiff and also to eliminate the exemption of the residence property from the lien of the alimony judgment, and to provide that all real estate of the defendant is subject to said alimony lien. The temporary alimony on appeal and advancements allowed by this court are to be properly credited. Plaintiff's attorneys allowed for services in this court $350 to be taxed with defendant's costs, otherwise each party to pay own costs of appeal.

AFFIRMED AS MODIFIED.

STATE, EX. REL. WILLIAM A. BURKETT, RELATOR, V. HARRY R. SWANSON, SECRETARY OF STATE, RESPONDENT.

291 N. W. 481

FILED MARCH 20, 1940. No. 30955.

1. **Elections.** An election to a public office, secured by a candidate by means of offers to the voters to perform the duties of the office for less than the legal salary or fees, constitutes a species of bribery which will invalidate an election.
2. ———. A person becomes a candidate for an office when he announces that he will seek election to the office.
3. ———. A candidate who has become disqualified to hold the office he seeks is necessarily ineligible to run for the office.

Original proceeding in mandamus by the state, on the relation of William A. Burkett, against Harry R. Swanson, secretary of state. *Writ denied.*

L. R. Doyle and *Malcolm Baldrige*, for relator.

Walter R. Johnson, Attorney General, and *Robert Nelson*, for respondent.

Heard before CARTER, J.

The record in this case discloses that the relator, William A. Burkett, completed his filing for nomination as the republican candidate for congress in the first district on the 24th day of February, 1940. On the same day, and in connection with his filing, he issued a statement to the press to the effect that he would serve as congressman, in the event of his election, without pay so long as the federal budget remained unbalanced. The statement appears to have been carried in the Nebraska State Journal and the Lincoln Daily Star, newspapers of general circulation in the first congressional district. Relator testifies that he made the statement without knowledge of its legal effect, and offered to unconditionally repudiate it in the event it was held to be disqualifying. The secretary of state canceled relator's filing on the ground that said statement disqualified relator for the office. This action was thereupon brought to compel the secretary of state to accept relator's filing and cause his name to appear on the ballot as a candidate for congress.

It has been generally held that an election to a public office, secured by a candidate by means of offers to the voters to perform the duties of the office for less than the legal salary or fees, constitutes a species of bribery which will invalidate an election. This has been so generally held to be the law that a citation of authority is hardly necessary. Cases in point are: *State v. Elting*, 29 Kan. 397; *State v. Collier*, 72 Mo. 13; and the cases cited in the annotation appearing in 106 A. L. R. 493. Promises made by a candidate to accept less than the stipulated salary in the event of his election involve a pecuniary consideration offered by the candidate in order to secure election in which the test of fitness for the office is not an element. Such promises and statements are condemned generally as violations of the corrupt practices act. Comp. St. 1929, ch. 32, art. 20.

Relator contends that he was not a candidate when the statements were made, and that he could not be a candidate until the ten-day period for filing objections had expired. Such a construction would defeat the whole purpose

of the corrupt practices act. To say that a person is not a candidate until ten days after he files, when the law requires objections to candidates to be made within ten days after the filing, is to distort the plain import of the law and destroy it wholly by construction. In my opinion, a person becomes a candidate for an office when he announces that he will seek election to the office. From that time on he is a candidate within the meaning of the corrupt practices act, and must comply with the provisions of that act. *Leonard v. Commonwealth*, 112 Pa. St. 607, 4 Atl. 220; *Adams v. Lansdon*, 18 Idaho, 483, 110 Pac. 280; *Norris v. United States*, 86 Fed. (2d) 379. To permit violations of the corrupt practices act on the eve of filing and thereby secure the benefit of promises generally held to be subversive to the public interest would amount to a circumvention of the statute. The intention of the legislature is clear and it becomes the duty of the courts to make it effective in the absence of constitutional prohibitions. There can be no question, therefore, that relator was a candidate within the purview of the corrupt practices act when he made the statement in question.

Relator contends that the corrupt practices act of this state has no application to a person who is a candidate for congress, a federal office. The federal corrupt practices act specifically subjects candidates for federal office to the laws of the state unless they be inconsistent with the federal law. 2 U. S. C. A. ch. 8. No inconsistency making the state law inapplicable has been pointed out.

Finally, the relator contends that he made the statements in good faith and without intention of violating any law. We doubt not that this statement is true, but it can avail the relator nothing. Want of knowledge of the law does not justify a plea of good faith. The corrupt practices act prohibits certain acts and conduct on the part of the candidates. The gist of the wrong was relator's offer to serve for less than the salary fixed by law. To permit ignorance of the law which he violated as a defense, im-

munity from punishment would result in almost every case. It is the violation of the law by the commission of the prohibited act that is condemned. The intent or good faith of the wrong-doer is not an element in the offense, nor a defense to the objections filed, when the wrongful act is established. A want of improper motive does not alleviate the subversive result prohibited by the state. An enlightened public policy requires that candidates for public office in this country be elected on the basis of fitness for the office and not on that of bargain and sale. To permit elections to go to the highest bidder would open the doors of our public offices to the worst type of corruptive influences. Our elections must express the free, intelligent, and unbiased judgment and choice of the electors, uninfluenced by pecuniary offers of candidates. if free government is to continue to exist. The good faith of the relator and his willingness to purge himself by a withdrawal of the statement cannot therefore be treated as a defense.

The point is made that the authorities cited are cases involving election contests after the candidates violating the corrupt practices act had been elected to the offices. While this is true, it is no doubt due to the fact that the wrongful acts were not committed until the election campaign was under way. In the instant case, the wrongful act was committed at a time when it could be decided before an election was held. The law does not require vain things to be done, and if it be established that a person has disqualified himself from holding the office for which he filed, he has necessarily become ineligible for the office. This being true, the secretary of state very properly decided that relator's name should not be placed on the ballot.

For these reasons the relator is not entitled to a writ of mandamus.

WRIT DENIED.

OTHA DAVIS, APPELLANT, V. JOSEPH O'GRADY, WARDEN, APPELLEE.

291 N. W. 82

FILED MARCH 22, 1940. No. 30759.

1. **Criminal Law.** The habitual criminal law of this state (Comp. St. 1929, secs. 29-2217, 29-2218) does not set out a distinct criminal offense, but provides that the repetition of criminal conduct aggravates the guilt and justifies heavier penalties.
2. **Constitutional Law.** Section 29-2217, Comp. St. 1929, of such law does not contravene sections 3, 9, or 12, of article I of the Constitution of Nebraska.
3. **Habeas Corpus.** "Habeas corpus is a collateral, not a direct, proceeding, when regarded as a means of attack upon a judgment sentencing a defendant." *Hulbert v. Fenton*, 115 Neb. 818, 215 N. W. 104.
4. ———. The judgment or sentence of a court of record in a criminal case, when challenged by habeas corpus, is supported by the usual presumptions of validity and regularity. To obtain release from a sentence of imprisonment by habeas corpus, such sentence must be absolutely void.
5. ———. Where an information charges distinct offenses in two or more counts, and where a defendant pleads "guilty" thereto, generally, he cannot complain in a habeas corpus proceeding of a sentence thereon which imposes a penalty applicable to either offense without designating on which count it is based. Under these circumstances, a sentence and judgment upon an information containing several counts need not designate upon which count it is based.
6. ———. We are committed to the doctrine that habeas corpus is never allowed as a substitute for an appeal or proceeding in error.
7. **Criminal Law.** "The constitutional right of accused to have the assistance of counsel may be waived, and a waiver will be implied where accused, being without counsel, fails to demand that counsel be assigned him." 16 C. J. 821.
8. ———. "A person charged with crime may, by a judicial confession of guilt, waive all the rights secured to him by section 11, article I of the Constitution." *McCarty v. Hopkins*, 61 Neb. 550, 85 N. W. 540.

APPEAL from the district court for Lancaster county: JOHN L. POLK, JUDGE. *Affirmed.*

Otha Davis, pro se.

Walter R. Johnson, Attorney General, and *George W. Ayres, contra.*

Heard before SIMMONS, C. J., ROSE, CARTER, MESSMORE and JOHNSEN, JJ., and ELLIS, District Judge.

PER CURIAM.

This is an appeal from a final order made in the district court for Lancaster county, upon a petition for a writ of habeas corpus presented thereto by Otha Davis, against Joseph O'Grady, warden of the Nebraska state penitentiary. Such order denied the issuance of the writ against the defendant, or any relief as in said petition prayed, for the reason "that the petition does not state a cause of action in favor of the petitioner or relator."

Included in relator's petition is a copy of an information filed against him in the district court for Howard county, Nebraska, by the duly elected, qualified, and acting county attorney of such county. It contained two counts. In the first count, in appropriate terms, Davis is charged with the crime of stealing, on or about the 4th day of November, 1936, 52 bushels and 10 pounds of wheat of the value of $56.85, the personal property of Mary Sack and Julius Iwanski. In the second count he is charged, in appropriate terms, with the crime of stealing, on or about the 25th day of November, 1936, 56 bushels and 10 pounds of wheat of the value of $64.03, the personal property of Mads Madsen. It is also alleged in each count of such information that the relator herein had twice, prior to each of the thefts charged therein, been convicted of theft, and had in each instance been sentenced to, and served a term in, the Nebraska state penitentiary; these allegations merely establishing his status as an habitual criminal on the dates of the commission of the offenses set forth in this information. It further appears in relator's petition that, after the filing of said information, the following proceedings were had in the district court for Howard county, Nebraska, viz.:

"Judgment.

"And, now, on this 15th day of December, 1936, the defendant being present in court in the custody of the deputy sheriff, and announced he was ready to plead to the information. Whereupon the information was read to the defendant by Charles Dobry, County Attorney of said county, and said defendant entered a plea of guilty. Statement of the defendant was taken. Defendant was thereupon asked if he has anything further to say why sentence should not be pronounced upon him, and he said he had not.

"It is therefore considered and adjudged by the court that the defendant be and he hereby is sentenced to the State Penitentiary at Lancaster, in Lancaster county, Nebraska, at hard labor, Sundays and Holidays excepted, for a period of ten (10) years, solitary confinement to be no part of this sentence.

"Edwin P. Clements, District Judge."

It further appears that the relator is now being held in the Nebraska state penitentiary in accordance with the foregoing sentence.

The relator challenges the validity of the habitual criminal statute of the state of Nebraska, section 29-2217, Comp. St. 1929, as in conflict with section 3, art. I, section 9, art. I, section 12, art. I, of the Constitution of Nebraska, and with article V and article VIII of the amendments to the Constitution of the United States. He also contends that the pretended judgment and sentence is null and void, in that it does not specify the offense of which petitioner was convicted, as required by section 20-1310, Comp. St. 1929; and as a final reason the relator alleges that he was not represented by counsel in the trial of his case.

This court is committed to the doctrines, viz.:

The legislature may enact an habitual criminal law punishing habitual offenders.

The habitual criminal law does not set out a distinct crime, but provides that the repetition of criminal conduct aggravates the guilt and justifies heavier penalties.

The fact that a defendant has been guilty of a second

felony does not make him guilty under the habitual criminal law of an offense for which he may be separately sentenced, but increases the punishment for the last felony.

"Habitual criminality" is, under the habitual criminal law, a state rather than a crime, and warrants greater punishment because of past conduct.

In the discussion of this question, Mr. Justice Hughes of the supreme court of the United States, in *Graham v. State of West Virginia,* 224 U. S. 616, 32 S. Ct. 583, 56 L. Ed. 917, employed the following language, viz.:

"The propriety of inflicting severer punishment upon old offenders has long been recognized in this country and in England. They are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted. Statutes providing for such increased punishment were enacted in Virginia and New York as early as 1796, and in Massachusetts in 1804; and there have been numerous acts of similar import in many states. This legislation has uniformly been sustained in the state courts. *Ross's Case,* 2 Pick. (Mass.) 165, 170; *Plumbly v. Commonwealth,* 2 Met. (Mass.) 413, 415."

In *Kuwitzky v. O'Grady,* 135 Neb. 466, 282 N. W. 396, this court approved the following pronouncements, viz.:

"An habitual criminal statute is sound in principle and sustained by reason. The legislature may well enact such a law to permit law enforcement officers to take into consideration the persistence of an offender in his criminal course. That the defendant has been guilty of a second felony does not make him guilty of an offense for which he may be separately sentenced, but, upon proof that the habitual criminal statute applies to his case, he may have his punishment for the last felony of which he has been convicted increased as provided by law. 8 R. C. L. 271, secs. 284, 285; *Mundon v. State,* 196 Wis. 469, 220 N. W. 650; *State v. Zywicki,* 175 Minn. 508, 221 N. W. 900. Our Nebraska court has said: 'Where, under a prosecution for felony, the state seeks to have the accused punished as an

habitual criminal under section 10177, Comp. St. 1922, it is proper to allege in the information and prove upon the trial that the accused has been previously convicted as provided in said section.' *Taylor v. State,* 114 Neb. 257, 207 N. W. 207. See, also, *Booth v. State,* 122 Neb. 544, 240 N. W. 753.

"Provisions for increasing the punishment for habitual criminals are found in the laws of nearly every state. In a few states the law may be so phrased as to require the filing of a supplemental information to present an issue of fact to be determined by a jury, first, as to the identity of the defendant, and, second, as to his former conviction and the execution of the sentence. In other states it presents a question of fact for the purpose of increasing the length of the sentence which may be imposed upon conviction of the felony. The two annotations, of great length, found in 58 A. L. R. 20, and 82 A. L. R. 345, give an exhaustive discussion of the various phases of the question, with citations from the various states.

"The federal courts have often been called upon to pass upon these laws when applications have been made for writs of habeas corpus.

"In a recent case from the circuit court of appeals for the seventh circuit, the court used this language: 'Habitual criminality is a state, not a crime. * * * Habitual criminal statutes, such as that of Indiana, do not create or define a new or independent crime, but they prescribe circumstances wherein one found guilty of a specific crime may be more severely penalized because of his previous criminalities as they are alleged and found. This was definitely decided in *Barr v. State,* 205 Ind. 481, 187 N. E. 259. In *McDonald v. Massachusetts,* 180 U. S. 311, 21 S. Ct. 389, 390, 45 L. Ed. 542, the court, in considering a statute imposing greater punishment because of prior convictions for crimes, said: "The allegations of previous convictions is not a distinct charge of crimes, but is necessary to bring the case within the statute, and goes to the punishment only." ' *Goodman v. Kunkle,* 72 Fed. (2d) 334."

It is obvious that relator's contentions as to the invalidity

of the Nebraska habitual criminal statute cannot be sustained, and its validity must be upheld.

Nor, do we find relator's contention, that the judgment or sentence is null and void because it does not specify the offense for which relator was convicted, sustainable.

"Habeas corpus is a collateral, not a direct, proceeding, when regarded as a means of attack upon a judgment sentencing a defendant." *Hulbert v. Fenton,* 115 Neb. 818, 215 N. W. 104. See, also, *Alexander v. O'Grady, ante,* p. 645, 290 N. W. 718.

The judgment or sentence of a court of record in a criminal case is thus supported by the usual presumptions of validity and regularity when thus attacked. To obtain release from a sentence of imprisonment by habeas corpus, such sentence must be absolutely void. *Hulbert v. Fenton, supra; Michaelson v. Beemer,* 72 Neb. 761, 101 N. W. 1007; *In re Carbino,* 117 Neb. 107, 219 N. W. 846.

The relator cites no statute of this state requiring the judgment or sentence to specify the offense of which a person is convicted, and we have been unable to find any.

As applied to questions involved in habeas corpus proceedings, the true rule appears to be, viz.:

"Where an indictment charges distinct offenses in two or more counts it has been held that defendant cannot complain of a sentence on a general verdict which imposes punishment applicable to either offense without designating on which count it is based, because, it being impossible to say on which count the sentence applied, it would be held to apply to all." 16 C. J. 1282.

So also, "Upon a conviction of a defendant upon several counts charging distinct crimes, each complete in itself without reference to the other, the court may pass a separate and cumulative sentence on each count, or it may treat the conviction as for one crime, the highest charged, and may impose one legally appropriate penalty." 23 Standard Ency. of Procedure, 455.

Again, "A sentence and judgment upon an indictment containing several counts need not designate upon which

count it is based, unless statute requires it." 23 Standard Ency. of Procedure, 456.

We need not consider the question before us as though presented on appeal or by error. We are committed to the doctrine that habeas corpus is never allowed as a substitute for appeal or proceeding in error. *Hulbert v. Fenton, supra; Michaelson v. Beemer, supra.*

As to the failure of the trial court to provide relator with the services of an attorney, the rule appears to be, viz.:

"The constitutional right of accused to have the assistance of counsel may be waived, and a waiver will be implied where accused, being without counsel, fails to demand that counsel be assigned him." 16 C. J. 821.

So also, this court is committed to the view that, "A person charged with crime may, by a judicial confession of guilt, waive all the rights secured to him by section 11, article I of the Constitution." *McCarty v. Hopkins,* 61 Neb. 550, 85 N. W. 540. See, also, *Smythe v. State,* 124 Neb. 267, 246 N. W. 461.

It follows, therefore, that the final order of the district court for Lancaster county denying relief to the relator was correct, and it is

AFFIRMED.

O. H. MEYER, APPELLANT, V. ADOLF J. PLATT ET AL., APPELLEES.

291 N. W. 86

FILED MARCH 22, 1940. No. 30777.

1. **Homestead.** Generally, where a homestead right of exemption has once attached to real property, that homestead property may be exchanged for another homestead and the right of exemption may follow and attach to the new homestead.
2. ———. The protection provided by section 40-116, Comp. St. 1929, for the proceeds of the sale of a homestead applies to property received in exchange for the homestead, not exceeding in value the amount of the exemption.
3. ———. The fact that an owner of an interest in real estate

denies his title will not deprive him of the benefit of the homestead exemption laws.

4. ———. A formal declaration that certain land has been selected as a homestead is not a necessary element in the establishment of the homestead right.

5. **Creditors' Suit.** Where other remedies are inadequate, an equity court has the power to take the unexempt property of a debtor, wherever found and in whatever condition it may be, and apply it to the payment of the debts of the owner.

APPEAL from the district court for Knox county: ADOLPH E. WENKE, JUDGE. *Reversed, with directions.*

Spillman & Ptak, for appellant.

Hutton & Mueting, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

SIMMONS, C. J.

This is an equity action brought to subject land in Knox county to the lien of a judgment obtained by the plaintiff against the defendant Platt. The record title of the land is in the name of the defendant Else Hahn.

Plaintiff's petition alleges the recovery of a money judgment against the defendant Platt, the return of an execution unsatisfied, the insolvency of Platt; that the defendant Platt on January 7, 1938, purchased 160 acres of land in Knox county, and that, without consideration, and for the purpose of hindering and defrauding the plaintiff and other creditors, Platt "took the record title" of the real estate in the name of the defendant Hahn. Plaintiff prays that the property be found to be the property of Platt, that the premises be ordered sold as required by law and the proceeds thereof applied to the payment of plaintiff's judgment, and for equitable relief.

The defendants, answering jointly, deny generally the allegations of plaintiff's petition, and allege that (1) in February, 1932, Hulda Platt, wife of the defendant Platt, purchased certain land in Stanton county, which became and was their homestead from the time of purchase until the spring of 1938, that Platt had no interest in or to said

premises; that on January 7, 1938, Hulda Platt traded the Stanton county land for the Knox county land (involved herein); that Hulda Platt, being in ill health, agreed in writing with her daughter (the defendant Else Hahn) that Else Hahn should support the said Hulda during her lifetime and be responsible for her funeral expenses, and that Hulda Platt "placed" the title to the Knox county land in the name of Else Hahn for the consideration above given; that Platt never had or claimed any legal or equitable interest in the land; that Platt did not own the Stanton county land and does not own the Knox county land; that "the interest placed in the name of Else Hahn did not belong to Adolf J. Platt, but to Hulda Platt;" (2) that the equity owned by Hulda Platt and "by her turned over" to Else Hahn did not exceed $2,000, and that the same was a homestead not subject to fraudulent alienation in any event; (3) that the note upon which judgment was had was given September 13, 1932, at which time Platt was not the owner of any real estate; that real estate of Platt together with a note and cash of Hulda Platt had been exchanged for the Stanton county land and title thereto placed in the name of Hulda Platt, prior to the signing of the note upon which the judgment was had; that the bank knew on September 13, 1932, that Hulda Platt was the owner of the Stanton county land; that the transfer of the Stanton county land to Hulda Platt was more than five years prior to the bringing of this action or the securing of the judgment against Platt, and that this action is barred by the statute of limitations. Defendants pray that the action be dismissed. The reply is a general denial.

The case was tried upon the issues presented, and at the close of plaintiff's case, the defendants moved for a dismissal of plaintiff's action. The trial court sustained the motion. Plaintiff appeals from that decision.

The case comes to this court for trial *de novo* (Comp. St. 1929, sec. 20-1925) subject to the rule that:

"When defendant moves to dismiss plaintiff's action at the close of plaintiff's evidence, the defendant thereupon

admits the plaintiff's testimony to be true, together with every conclusion which may fairly and reasonably be drawn therefrom.

"The court must thereupon determine, as a question of law, whether plaintiff's evidence is sufficient to support a judgment for the plaintiff." *Schroeder v. Bartlett,* 129 Neb. 645, 262 N. W. 447.

The ultimate question to be determined is: Does the defendant Platt own the Knox county land or an interest therein? This requires a review of the evidence.

The plaintiff called as his witnesses, among others, the defendants Platt and Hahn. The testimony of the plaintiff's witnesses fairly and reasonably establishes the following facts.

The defendant Hahn is the daughter of the defendant Platt and Hulda Platt. Prior to October 30, 1931, the defendant Platt became indebted to the First National Bank of Madison. This debt was evidenced by the usual promissory note. This note was renewed in September, 1932, and subsequently became the property of the plaintiff. Judgment was recovered thereon against the defendant on July 13, 1938; a transcript thereof was filed with the clerk of the district court of Knox county August 6, 1938; execution was issued and was returned unsatisfied. The judgment has not been paid.

On or before September 12, 1931, the defendant Platt became the owner of a tract of land in Platte county. The Platte county land, and a lease with the notes for cash rent thereon, were conveyed to one Filter in March, 1932, in exchange for a 320-acre tract in Stanton county. The lease and the cash rent notes were in the name of the defendant Platt and were assigned to Filter by Platt. The Platte county land was not the homestead of the Platts.

The exchange contract provided that the Stanton county land should be conveyed subject to a $13,000 mortgage, and that as a part of the purchase price the Platts should give to Filter a second mortgage thereon for $3,500. When the deed conveying the Stanton county land from Filter to Platt

was being prepared, Platt ordered his attorney to "put that property in my wife's name right away." Concurrently therewith, the Platts mortgaged the land to Filter to secure the promissory note of the defendant Platt for $3,500. The consideration for the deed from Filter to Mrs. Platt all moved from the defendant Platt.

The Platts entered into possesssion of the Stanton county land and occupied the same as their homestead from the spring of 1932 until about March 1, 1938. During the years 1932 to 1934, the defendant Platt leased the land and collected the rents, and thereafter farmed the land, and at all times exercised rights of ownership therein and referred to the land and the crops thereon as "his."

On January 7, 1938, Platt traded the Stanton county land for the land in Knox county involved in this action. The deed conveying the Knox county land recited a consideration of $4,000, and in that deed, the defendant Else Hahn was named as grantee. No consideration moved from the defendant Hahn to the grantor for said conveyance. About March 1, 1938, the defendant Platt with one daughter moved to the Knox county land and farmed the same. His wife, Hulda, afflicted with a fatal illness, and one other daughter lived with the defendant Hahn at Madison, Nebraska. So far as the record shows, the defendant Platt was residing on the Knox county land at the time of the trial.

Platt testified that he worked for his daughter in 1938, operating the farm without pay as "manager and worker." However, Mrs. Platt had a lease from the defendant Hahn for the premises, and Mrs. Hahn had her mother's note for cash rent of the land.

Platt painted and repaired the buildings, fences, etc., and testified that Mrs. Hahn bought the paint, but it was charged to him and he paid for it out of "her" crop.

Shortly after the conveyance of January 7, 1938, the defendant Platt told his nephew that "he made a good trade and he signed the farm over from Hulda to Else and got a deed back from Else and when she gets smart he wants to

put that deed on record," and that he had the Knox county land placed in Else Hahn's name. Platte referred to the corn raised on the Knox county land as "his corn." In the spring of 1938, the defendant Platt tried to get a loan on the Knox county land "to pay off the interest of his daughter Else Hahn and pay some taxes and make repairs on the improvements." He tried to sell "my place" that was "in the name of Else Hahn."

January 8, 1938, the day after "they made the deal," Hulda Platt told the defendant Hahn about "this deal," and the deed, and "she told me it was made to me to take care of her because she was very ill at that time, to take care of her and take care of her doctor bills and such things as long as she lived," and that they discussed the consideration for the deed the first time on January 8, 1938 (the day after the deed was made placing the title in her name). The defendant Hahn further testified that the Knox county land was "filed" in her name.

The value of the Stanton county land is not shown. The value of the Knox county land is shown to be from $3,200 to $4,000.

The plaintiff has submitted his evidence and rested. The defendants by their motion have submitted the matter to the court for determination. This court, having jurisdiction of the persons and subject-matter, will afford complete relief and determine finally the controversy between the contending parties upon the record which they have made.

The trial court found that the Stanton county land was "in fact the property" of Platt and sustained the defendants' motion to dismiss upon the theory that the Stanton county land was the homestead of the Platts, that their equity therein did not exceed $2,000 in value, that it could be conveyed free of judgment liens, and that the indirect conveyance to the defendant Hahn was no different than if the Platts had conveyed the Stanton county land to the daughter (defendant Hahn) and she in turn had exchanged it for the Knox county land.

The Stanton county land was the homestead of the defendant Platt and his wife, Hulda. It is true that there were 320 acres in the Stanton county land and that the homestead exemption attached to but 160 acres. The land was heavily encumbered. The Platts would have had the right to have segregated 160 acres as a homestead and to have required that the remaining 160 acres be first sold to satisfy liens thereon, removing so far as possible the liens against the 160 acres which they could have claimed as a homestead, and in which they could claim the statutory $2,000 exemption from sale to satisfy judgment creditors. So, as a practical proposition, the Platts had an exemption of $2,000 in the Stanton county land so far as a judgment creditor was concerned. See *Smith v. Neufeld*, 57 Neb. 660, 78 N. W. 278.

The homestead exemption which Platt had in the Stanton county land attached to the Knox county land. "It is a general rule that a homestead once acquired may be exchanged for another, and, when that is done, the homestead privileges and rights attach to the new as they formerly did to the old homestead." 13 R. C. L. 588, sec. 52. See 29 C. J. 837. By section 40-116, Comp. St. 1929, if the homestead be conveyed by the claimant, the proceeds of the sale, not exceeding the amount of the exemption, shall be entitled, for six months thereafter, to the same protection which the law gives to the homestead and the sale and disposition of one homestead shall not be held to prevent the selection or purchase of another. See *Prugh v. Portsmouth Savings Bank*, 48 Neb. 414, 67 N. W. 309. Property received in exchange not exceeding in value the amount of the exemption is protected by the statute. See *Derby v. Weyrich*, 8 Neb. 174; *Dargan v. Williams*, 66 Neb. 1, 91 N. W. 862; *Scheel v. Lackner*, 4 Neb. (Unof.) 221, 93 N. W. 741; *Witt v. Teat*, 167 S. W. (Tex. Civ. App.) 302; *Corey v. Plummer*, 48 Neb. 481, 67 N. W. 445.

Following the exchange, Platt removed to the Knox county land, lived thereon with one of his children, and improved the land and buildings. His wife Hulda, because of her ill-

ness, which was fatal, did not reside there with him, but lived with the defendant Hahn. The fact that by his answer he disclaimed ownership of the Knox county land and testified that the defendant Hahn owned the land will not deprive him of the benefit of the exemption laws. *State v. Carson*, 27 Neb. 501, 43 N. W. 361; 22 Am. Jur. 107, sec. 140; 25 C. J. 122. A formal declaration by Platt that he had selected the Knox county land as a homestead is not necessary. *Foltz v. Maxwell*, 100 Neb. 713, 161 N. W. 254.

The Platts could have conveyed their equity, of not exceeding $2,000 in value, in the Stanton or Knox county land to the defendant Hahn free from the existing debts of Platt. *Bank of Bladen v. David*, 53 Neb. 608, 74 N. W. 42. However, they did not do so. The Stanton county land was not conveyed in fee to the defendant Hahn. Title to the Knox county land was "placed" in the defendant Hahn as security to assure the payment of certain expenses of the last illness and death of Hulda Platt. Hulda Platt was not the owner of the Stanton county land. Whatever interest she had therein was limited to the homestead exemption.

Transactions of this character between close relatives are presumptively fraudulent as to existing creditors, and in litigation between creditors and the parties thereto, the burden is on them to establish the good faith of the transaction by a preponderance of the evidence. *Riggs v. Hroch*, 133 Neb. 260, 274 N. W. 598.

The defendant Hahn has not established ownership of the Knox county property or claim thereto over and above the homestead exemption. Beyond that exemption, the property belongs to Platt. Whatever claim the defendant Hahn may have against the $2,000 of exempt value is not before us and is not determined.

Had Platt taken the title to the Knox county land in his own name, it would have been subject to the lien of the plaintiff's judgment junior to the homestead exemption.

Should an equity court hold it subject to the judgment under the circumstances here presented?

"It has always been one of the powers possessed by courts

of equity to compel the application of a debtor's unexempt property to the payment of his debts when the creditor had no other means of redress. * * * When all other remedies have failed, a court of equity will, at the suit of a creditor, take the unexempt property of a debtor wherever found, in whatever condition it may be, and cause it to be applied towards the payment of his debt." *Arlington State Bank v. Paulsen*, 57 Neb. 717, 734, 78 N. W. 303. See *Millard v. Parsell*, 57 Neb. 178, 77 N. W. 390; 15 C. J. 1401; 14 Am. Jur. 707, sec. 60, note 17. Fraud is not an element to be proved by the plaintiff in such a case. *Weckerly v. Taylor*, 74 Neb. 84, 103 N. W. 1065; *Cochran v. Cochran*, 62 Neb. 450, 87 N. W. 152.

The record establishes the following facts: (1) Platt owned the Platte county land which was exchanged for the Stanton county land. (2) Although the title to the Stanton county land was placed in the name of Hulda Platt (the wife), it was in fact the property of Platt, and he was (as the trial court found) the equitable owner thereof. (3) The Stanton county land became the homestead of the Platts and the statutory homestead exemption attached thereto. (4) Platt likewise, by the exchange, became the equitable owner of the Knox county land. (5) Platt's right of homestead exemption attached thereto. (6) The defendant Hahn held title thereto not as owner of the fee, but under claim of title as security for money advanced for the care of Hulda Platt. (7) This claim, if valid, attaches to the homestead exemption, and not to any excess value therein above $2,000, for the reason that no consideration for the Knox county land moved to Platt from either his wife or daughter. (8) Whatever value there may be in the Knox county land above $2,000 belongs to Platt and is subject to the satisfaction of the plaintiff's judgment.

The cause is reversed and remanded to the trial court, with instructions to enter a decree in accord with this opinion.

REVERSED.

JOHN WILBERT DILL ET AL., APPELLANTS, v. HOWARD W. HAMILTON ET AL., APPELLEES.

291 N. W. 62

FILED MARCH 22, 1940. No. 30577.

1. **Action.** The relief grantable in a proceeding for a declaratory judgment extends to the construction or validity of a statute, where there is a justiciable, determinable controversy between the parties in respect to rights or penalties thereunder. Comp. St. 1929, sec. 20-21,141.
2. ———. Relief in a proceeding for a declaratory judgment in a justiciable case may depend on the construction or validity of a statute.
3. ———. Plaintiffs are not required to violate a penal statute as a condition of having it construed or its validity determined in a proceeding for a declaratory judgment.
4. ———. Jurisdiction of a court to pronounce a declaratory judgment is not lacking merely because the construction or validity of a statute authorizing a fine and an imprisonment is necessary to a decision.
5. **Criminal Law.** A statute authorizing imprisonment for violation of its provisions imposes no restrictions on conduct except those specifically enumerated in the legislative act.
6. **Theaters and Shows.** The act to prohibit "all public exhibitions of hypnotism, mesmerism, animal magnetism, or so-called psychical forces, for gain," does not prohibit spiritualistic seances, unless they are public and open and for gain. Laws 1911, ch. 182, sec. 1; Comp. St. 1929, sec. 28-1111.
7. **Constitutional Law.** The making of a public exhibition of religious worship in the form of a seance, for gain, on the stage or at a carnival, fair, circus, or show is not a religious liberty guaranteed by the Constitution.
8. **Theaters and Shows.** The police power to prohibit public exhibitions for money-making purposes or for gain extends to harmful, immoral or indecent performances, though conducted in the name of religion, and violators of such prohibitions are subject to statutory penalties therefor.
9. ———. A guaranty of $15 to remunerate a medium for conducting a spiritualistic seance as a religious ceremony in the worship of God and the creation of the fund by voluntary contributions of communicants of the Spiritualistic Church do not amount to "gain" within the meaning of the statute forbidding public seances for gain.

APPEAL from the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Reversed.*

Roland Max Anderson, for appellants.

Robert B. Waring and *John C. Gewacke, contra.*

Heard before SIMMONS, C. J., ROSE, PAINE, CARTER, MESSMORE and JOHNSEN, JJ., and ELLIS, District Judge.

ROSE, J.

Under the declaratory judgment act, plaintiffs, alleging they are officers or members and communicants of the Spiritualist Church, applied to the district court for Fillmore county for a judgment declaring their right to worship God according to their religious beliefs, tenets of faith, ceremonies and rituals, including spiritualistic seances, and also declaring the law to be such as to prevent defendants, who are prosecuting, executive and judicial officers, from interfering with the religious freedom and the devotional exercises of plaintiffs.

The petition contains allegations disclosing incorporation of the Spiritualist Church, its membership, tenets of religious faith, ceremonies and rituals, interference therewith by defendants and threats of future prosecutions for violations of the statute forbidding public exhibitions of religious seances for gain.

Defendants assailed the petition by demurrer which was sustained by the district court and the proceeding dismissed. Plaintiffs appealed.

The demurrer challenges the sufficiency of the petition to state a justiciable case for a declaratory judgment. The determination of the issue thus raised depends on the power conferred upon the courts by the declaratory-judgment act, on the meaning and validity of the act to prohibit all public exhibitions of psychical forces or seances conducted by a spiritualistic medium for gain, and on the allegations of the petition. Declaratory judgments are authorized by the following provisions of statute:

"The supreme court and courts of general chancery and common-law jurisdiction shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree." Laws 1929, ch. 75, sec. 1; Comp. St. 1929, sec. 20-21,140.

"Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder." Laws 1929, ch. 75, sec. 2; Comp. St. 1929, sec. 20-21,141.

"The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." Laws 1929, ch. 75, sec. 6; Comp. St. 1929, sec. 20-21,145.

The statute under which the present controversy arose provides:

"Any person or persons who shall hereafter take part in, practice, assist, or become a subject in giving a public, open exhibition or seance or show of hypnotism, mesmerism, animal magnetism or so-called psychical forces for gain shall be deemed guilty of a misdemeanor." Laws 1911, ch. 182, sec. 1; Comp. St. 1929, sec. 28-1111.

Violations of the act subjects the violators upon conviction to fine or imprisonment or both. Plaintiffs allege and contend that they are threatened by defendants with prosecutions for conducting spiritualistic seances as religious exercises authorized by their established mode of worship,

that defendants construe the act to authorize such prosecutions, and that so construed it is unconstitutional. The petition alleges further than John Wilbert Dill, one of the plaintiffs, is an ordained spiritualistic medium and minister of the Gospel; that he was formerly prosecuted, convicted and fined for alleged violation of the penal statute quoted and paid the fine to avoid imprisonment. Other members of the church are also plaintiffs herein, but no attempt is now made to substitute this proceeding for a new trial in the criminal prosecution or for an appeal or for another action. The former prosecution of Dill is not material to the proceeding at bar except perhaps to indicate a controversy and the necessity for a declaratory judgment. The relief grantable in a proceeding for a declaratory judgment extends by the very terms of the legislative act to the construction or validity of a statute, where there is a justiciable, determinable controversy between the parties in respect to "rights, status or other legal relations thereunder." Plaintiffs, seeking a declaratory judgment, are not required in advance to violate a penal statute as a condition of having it construed or its validity determined. "Declaratory judgment proceedings," says a text, "have frequently been employed to determine questions as to the construction or validity of statutes." 16 Am. Jur. 296, sec. 24. Another writer on the same subject, citing cases, says:

"The danger of a criminal penalty attached by law to the performance of an act affords those affected the necessary legal interest in a judgment raising the issue of validity, immunity, or status." Borchard, Declaratory Judgments, p. 47.

The supreme court of Nebraska by unanimous opinion adopted the following views expressed by the supreme court of Kansas:

"It is hardly conceivable that any fundamental principle of our government, beyond legislative control, prevents two disputants, each of whom sincerely believes in the rightfulness of his own claim, but each of whom wishes to abide by the law whatever it may be determined to be, from obtain-

ing an adjudication of their controversy in the courts without one or the other first doing something that is illegal (in the case of the present defendant criminal) if he is mistaken in his view of the law." *Lynn v. Kearney County,* 121 Neb. 122, 236 N. W. 192; *State v. Grove,* 109 Kan. 619, 201 Pac. 82.

Jurisdiction of a court to render a declaratory judgment is not, therefore, lacking merely because the construction or validity of a penal statute is necessary to a decision. In view of the conclusions of law reached in connection with the facts stated in the petition and admitted by the demurrer, the petition is not demurrable. The ruling below to the contrary is erroneous.

Does the act prohibiting "all public exhibitions of hypnotism, mesmerism, animal magnetism, or so-called psychical forces, for gain," deprive plaintiffs of religious rights guaranteed by the federal and state Constitutions? The language quoted is from the title of the act and is not legislation but indicates the subject of legislation. Alleged illegal interference with religious seances conducted by a spiritualistic medium is the subject of controversy. The prohibitions of the act itself are in this form:

"Any person or persons who shall hereafter take part in, practice, assist, or become a subject in giving a public, open exhibition or seance or show of hypnotism, mesmerism, animal magnetism or so-called psychical forces for gain shall be deemed guilty of a misdemeanor." Laws 1911, ch. 182, sec. 1.

Plaintiffs allege in substance that defendants so construe the act "as to deprive the plaintiffs as members and officers of the Spiritualistic Church of their constitutional rights to freedom of religious worship;" that the Spiritualist Church is a religious society organized, existing and doing business for sectarian and religious worship of Almighty God in accordance with the divine word of the Holy Bible; that seances are among the rites and ceremonies of the Spiritualist Church; that one form of worship is designated by the ordinance and canons of the church as a "seance;" that "A

medium is one whose organism is sensitive to vibration from the spirit world and through whose instrumentality intelligences in that world are able to convey messages and produce the phenomena of spiritualism;" that a seance constitutes one of the most formal and solemn religious services of the Spiritualist Church; that the remuneration of a spiritualistic medium for conducting a religious seance was the authorized, guaranteed, fixed sum of $15 to be raised by voluntary contributions of local communicants in attendance at religious meetings.

A statute authorizing imprisonment for violations of its provisions imposes no restrictions on conduct except those specifically enumerated in the legislative act. The act to prohibit "all public exhibitions of hypnotism, mesmerism, animal magnetism, or so-called psychical forces, for gain," does not prohibit spiritualistic seances, unless they are public and open and for gain. Laws 1911, ch. 182, sec. 1; Comp. St. 1929, sec. 28-1111. The words "psychical forces" as used by the lawmakers apply to a seance conducted by a spiritualistic medium, but his act as such does not violate the statute unless it is "public" and "open" and "for gain." Spiritualistic seances are not of themselves denounced by the lawmakers as criminal. The making of a public exhibition of religious worship in the form of a seance for gain on the stage or at a carnival, fair, circus, or show is not a religious liberty guaranteed by the Constitution. The police power to prohibit public exhibitions for money-making purposes or "for gain" extends to harmful, immoral, or indecent performances, though conducted in the name of religion. These are evils against which the statute is directed. Persons or members of any organization or society committing such offenses are amenable to the law and subject to prosecution and punishment. Plaintiffs, however, disavow any intention to commit such offenses. The act to prohibit "all public exhibitions of hypnotism, mesmerism, animal magnetism, or so-called psychical forces, for gain," does not prohibit spiritualistic seances, unless they are public and open and for gain. Laws 1911, ch. 182, sec.

1; Comp. St. 1929, sec. 28-1111. The statute as herein construed is a valid exercise of police power.

With the truth of the allegations of the petition admitted by the demurrer, a guaranty of $15 to remunerate a medium for conducting a spiritualistic seance as a religious ceremony in the worship of God and the creation of the fund by voluntary contributions of communicants of the Spiritualist Church do not amount to "gain" or a violation of law within the meaning of the statute forbidding public seances for gain.

The district court erred in sustaining the demurrer and in dismissing the proceeding, and for those errors the judgment is reversed. Defendants, however, are permitted to plead further, if so advised, but if they fail to do so, the district court, in that event, is instructed to enter a declaratory judgment conforming to the views herein expressed.

REVERSED.

PAINE, J., dissenting.

This is a difficult case. It was first argued to this court on March 20, 1939, and no opinion being adopted by a vote of four members of the court, it was ordered reargued on January 17, 1940, and has been given careful and patient study by the members of this court.

From the decision now adopted, I respectfully dissent, for in my opinion it is simply an attempt to appeal in a criminal case by use of the declaratory judgment law. Mr. Dill was arrested, and pleaded not guilty in the county court. Trial was had. Witnesses were called by each side, and he was found guilty and fined $25 and costs, and, deciding not to appeal to the district court, paid his fine and costs.

In the statutes of Nebraska, we find the declaratory judgment law in the chapter entitled, "Civil Procedure, District Court," and several of the sections relating thereto are set out in the main opinion.

In the outstanding text on the declaratory judgment law, it may be admitted that the one sentence set out in the main opinion can be found on page 47 in Borchard that appears to indicate that the validity of the criminal penalty may be

tested by the declaratory judgment act, but I maintain that the general trend of this author is against the proposition. Let us examine other references:

"The declaratory action is not a substitute for a new trial or an appeal from a former judgment deciding identical issues or issues which the court believes were passed upon." Borchard, Declaratory Judgments, 181. But, on page 562, we find this paragraph: "Far more interesting are the cases in which the plaintiff, threatened with criminal penalty, * * * demands the construction or interpretation of the statute to the end of establishing his privilege or freedom from the threatened sanction."

This statement in Borchard's text would appear to sustain the position of plaintiff in the case at bar. However, a careful examination of each of the cases given in the text as the authority upon which the author bases these statements does not support the theory. The cases are as follows:

"*Fraser v. Campion,* 29 N. Z. 1009 (1910) (that private burial ground was 'burial ground' within statute, otherwise deed would be void as contrary to rule against perpetuities);

"*Budge v. Bayly,* 31 N. Z. (1911) (whether lease had been validly renewed under statute—lessor v. lessee);

"*Grubner v. Wright,* (1921) N. Z. 394 (whether defendant could purchase Crown leasehold for son).

"*Lindsey v. Drane,* 154 Tenn. 458, 285 S. W. 705 (1926) (to impound trespassing animals or enforce lien for damages);

"*In re Joel's Lease; Berwick v. Baird,* (1930) 2 Ch. 359 (that defendant's lease did not constitute statutory 'holding' and that no notice necessary to terminate it);

"*Wesleyan & Gen. Ass'ce Soc. v. Attorney-General,* (1933) Ch. 591 (whether, under statute, profits from industrial insurance could be applied for benefit of ordinary life policyholders);

"*Loyal Marlborough Lodge v. Rogers,* 29 N. Z. 141 (1909) (plaintiff's privilege of buying in property sold by him as mortgagee);

"*University of New Zealand v. Solicitor-General,* (1917)

N. Z. 353 (method of university administration under statutes);

"*Rowley v. Canterbury Slaughtermen's Indus. Union of Workers,* (1918) N. Z. 684 (meaning of 'same industry' for determination of question whether two unions were privileged to unite);

"*Heel v. O'Neill,* (1933) N. Z. 319 (effect of Expenditure Adjustment Act on lease between plaintiff and defendant, former asserting defendant's no-right to make deductions from rent)."

Can it be said that any one of these cases will support a finding that relief will be granted under declaratory judgment law against a conviction for a violation of a criminal law?

From an examination of these citations, does it not appear that they are in accord with the statement in *Sheldon v. Powell,* 99 Fla. 782, 128 So. 258, to the effect that the application of the declaratory judgment act is held restricted to suits in equity by those interested under deeds, wills, contracts, or other written instruments?

In England and the British Dominions, declaratory judgments have been in effect for a much longer time than in the United States. We find in British reports many guiding precedents for the exercise of court's discretion. In *Russian Commercial & Industrial Bank v. British Bank,* 90 L. J. K. B. n. s. 1089, it was said by the House of Lords: "The question in what cases the jurisdiction to give a declaratory judgment should be exercised has been considered in a number of cases which were called to our attention by counsel for the appellants. It should be exercised *'sparingly'* * * * 'with *care* and *jealousy'* * * * *'with extreme caution.'*" (Italics mine.) See 34 Law Notes, 48 (June, 1930).

In annotations, 68 A. L. R. 110, and 114 A. L. R. 1361, the illustrative cases on declaratory judgments cover matters relating to estates and trusts, validity of instruments, such as wills, contracts, leases, insurance policies, bills of sale, mortgages, deeds of trust, and assignments, covering the same matters set out in section 20-21,141, Comp. St. 1929.

No case is cited like the one at bar, wherein a person, who has been tried and found guilty, decided to close up the matter and pay his fine, rather than appeal to the district court, in which he could have been tried on the charge by a jury, but who, on the other hand, thereafter attempted to test out the question by bringing a declaratory judgment action, threatening to commit the same acts a second time, and desiring to find out in advance from the supreme court whether he could again be found guilty.

It is also well settled here, as in England, that relief by declaration of right or a declaratory judgment is discretionary with the court, and the power of the court in this regard will be exercised with caution.

Many courts have held that, the trial court having exercised its discretion and decided not to give relief under this declaratory judgment law, the supreme court should not reverse the trial court unless this court can find that its ruling was an abuse of its discretion, which has not been shown in this case.

May I call attention to another insurmountable obstacle which faces this court in attempting to determine and limit in advance what a criminal statute of our state would or would not cover. I refer to the fact that in this case the state of Nebraska was not made a party.

Section 20-21,150, Comp. St. 1929, specifically requires: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding."

Section 20-21,152, Comp. St. 1929 (of the declaratory judgment act), defines "person" as including, among others, municipal or other corporations, but does not specifically include the state of Nebraska, and the state is not ordinarily bound by any act unless especially mentioned therein. For this court has said in *State v. Boone County,* 78 Neb. 271, 110 N. W. 629: "In this country it is generally held that the sovereign power is not bound by general words in a statute, but only when included expressly or by necessary implication."

All criminal prosecutions in this state are brought in the name of the state of Nebraska, and in the case at bar the state of Nebraska is not made a party, but only the county judge, county attorney, and sheriff of one of the 93 counties of Nebraska. We note that there appears in the transcript an acknowledgment by the attorney general of service, and receipt of copies, and notice of the proceedings, but in my opinion this does not in any way make the state of Nebraska a party to this case. See *Anstine v. State, ante,* p. 148, 288 N. W. 525.

"The presumption of a legislative intent to exclude the state from the operation of a statute is based on the fact that laws are ordinarily made for the government of citizens and not of the state, and the probability that, if the legislative power intended to divest the sovereign power of any right, privilege, title or interest, it would say so in express words. Where an act contains no words to express such an intent, it will be presumed that the intent does not exist." 25 R. C. L. 784, sec. 32.

"Declaratory judgments act is applicable only where there is a present, actual controversy, and only where justiciable issues are presented and all persons are made parties to the proceeding." *Dobson v. Ocean Accident & Guarantee Corporation,* 124 Neb. 652, 247 N. W. 789, in which the judgment was refused because the city was not made a party to the proceeding, and would not be concluded by any judgment in the action. See, also, 12 Neb. Law Bulletin, 262; *Smithberger v. Banning,* 130 Neb. 354, 265 N. W. 10.

Therefore, I submit the question: If an action to limit by interpretation one of our criminal laws would lie under the declaratory judgment act, would not the state, instead of one of 93 county attorneys, be an absolutely necessary party?

A declaratory judgment should be denied in all cases where it is evident that it is designed to take the place of an appeal. If all parties are not joined, it is proper to dismiss an application for a declaratory judgment because it failed in its essential purpose.

"More often, however, the court dismisses the proceed-

ing, on the ground that some designated necessary party or parties should have been heard, not only for the information of the court but because such a party might be affected by, even though not bound by, the decision; and in so conclusive a proceeding it would be neither just nor proper to render a judgment without hearing and binding such interested person." Borchard, Declaratory Judgments, 104.

There is a difference of opinion as to the nature of declaratory judgment proceedings. It has been held that they are equitable in nature. *Town of Manchester v. Town of Townshend,* 109 Vt. 65, 192 Atl. 22, 110 A. L. R. 811.

In other cases, the declaratory judgment act is regarded as a step to obliterate the twilight zone between law and equity, even though it has been held that a court of equity may not declare a purely legal right. 87 A. L. R. 1245; 16 Am. Jur. 289, sec. 15.

In a recent opinion by this court, it was unanimously held: "The declaratory judgment law is not substitute for new trial or appeal, nor does it operate to supersede former adjudications or proper proceedings already pending in a court having jurisdiction of parties and subject-matter." *Phelps County v. City of Holdrege,* 133 Neb. 139, 274 N. W. 483.

"The purpose of the declaratory judgment act was to have a declaration of rights not theretofore determined, and not to determine whether rights theretofore adjudicated had been properly adjudicated. In other words, it was never intended as a substitute for a new trial, or other steps that the Code requires to be taken in the same action, or for an appeal to this court. In the circumstances, the court below should have dismissed the proceeding and not have proceeded to adjudicate the rights of the parties." *Back's Guardian v. Bardo,* 234 Ky. 211, 27 S. W. (2d) 960.

In *State v. General American Life Ins. Co.,* 132 Neb. 520, 272 N. W. 555, we determined that the state of Nebraska might seek relief under the declaratory judgment act, but that is easily distinguished from the case at bar.

Section 20-21,145, Comp. St. 1929, reads: "The court

may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding."

Our Constitution reposes in the constitutional jury the ultimate and final right of determining facts in cases involving the punishment of crimes, and provides that the right thereto shall remain inviolate, and that all persons accused of a crime shall be entitled to a speedy public trial in the county where the offense is alleged to have been committed, with full right of appeal to this court.

Courts of equity and tribunals vested with powers of decision under the declaratory judgment act may not expressly, or by necessary implication, usurp power in violation of the constitutional guaranties of jury trials, and attempt to set up acts which will, or will not, render one guilty under a criminal law.

In my opinion, it would not be proper to enter a declaratory judgment in the case at bar, and the trial court was right in sustaining the demurrer and dismissing the petition.

STATE. EX REL. WILLIAM H. WRIGHT, ATTORNEY GENERAL, PLAINTIFF, V. GEORGE E. HINCKLE, DEFENDANT.
291 N. W. 68

FILED MARCH 22, 1940. No. 30016.

1. **Contempt.** "Where a contempt proceeding is instituted by information and a rule to show cause, it is the duty of the defendant to file an answer if he desires to traverse the facts charged. Failing on sufficient opportunity to so do, the court may treat the facts alleged in the information as confessed." *Nebraska Children's Home Society v. State*, 57 Neb. 765, 78 N. W. 267.
2. **Attorney and Client.** "The supreme court possesses the inherent power to punish for contempt any person assuming to practice law within the state without having been duly licensed so to do." *State v. Barlow*, 131 Neb. 294, 268 N. W. 95.

3. ———. The practice of law includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be pending in court.
4. ———. Record examined and *held* sufficient, under the circumstances, to support a judgment of guilty of contempt of court, in violation of section 20-2121, Comp. St. 1929.

Original action for contempt by the state, on the relation of the attorney general, against George E. Hinckle. *Defendant held guilty of contempt.*

Walter R. Johnson, Attorney General, and *Rush C. Clarke,* for plaintiff.

George E. Hinckle, pro se.

Heard before ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

MESSMORE, J.

On September 21, 1936, application for leave to file information, affidavit and motion for citation for contempt of court was filed in the supreme court of Nebraska by William H. Wright, then attorney general, against the defendant, George E. Hinckle, and others. On the same day leave was granted by the court to file the aforesaid instruments and the same were filed. The prayer of the information was that this court make and enter an order, directing the defendants to appear before this court and make answer, if any there be, on the 26th day of October, 1936, and show cause by such answer why defendants should not be punished for contempt of court for the commission of the offenses set forth in the information. The record does not contain an answer by defendants.

On February 24, 1940, the state of Nebraska filed a motion in this court, supported by an affidavit, praying the court that an attachment or warrant be issued for the apprehension and arrest of defendant George E. Hinckle, and that he be brought before the court, at a time to be fixed by the court, to show cause, if any there be, why he should not be punished for contempt, as prayed in said original infor-

mation. February 24, 1940, the court ordered the arrest of defendant George E. Hinckle, and that he be brought before the court, to be dealt with according to law. In furtherance of this procedure, the court made a finding that there was danger that defendant Hinckle would depart the jurisdiction of the court before the expiration of the time fixed by the court when he may appear and show cause why he should not be punished for contempt, as prayed in the original information; ordered the arrest of the defendant; fixed the amount of his bail in the sum of $1,000; ordered that in default thereof said defendant be committed to the county jail of Lancaster county; and directed the defendant to appear before this court and make answer, if any there be, on the 11th day of March, 1940, at 9 o'clock a. m., and then and there show cause, if any there be, why he should not be punished for contempt of this court for the commission of the offenses, and every one thereof, set forth in the original information.

On March 12, 1940, at 9 o'clock a. m., the supreme court convened in regular session for the purpose of the further hearing of this cause. Rush C. Clarke, assistant attorney general, appeared for and in behalf of the state; defendant Hinckle did not appear by an attorney, did not file a written answer in this cause and was found to be in default of answer, but was personally present. After being first duly sworn, he voluntarily made a statement to the court, which was reduced to writing, and became a part of the record in this case.

This is an original action for contempt for the illegal practice of law by the defendant, George E. Hinckle, and others. The case proceeded as against defendant Hinckle.

We believe that it would unnecessarily lengthen this opinion to set forth each of the 17 charges separately, and we are content with the statement that each charge is in detail, specific and conclusive as to constitute an offense as claimed. The substance of the charge and charges is that this defendant wilfully, knowingly, contumaciously, unlawfully and intentionally engaged in the practice of law

without a license so to do, and pretended to practice law as such attorney, in violation of chapter 7, Compiled Statutes of Nebraska for 1929, section 7-101 of which reads in part: "No person shall be admitted to practice as an attorney or counselor at law, or commence, conduct, or defend any action or proceeding to which he is not a party, either by using or subscribing his own name, or the name of any other person, or by drawing pleadings, or other papers to be signed and filed by a party, in any court of record of this state, unless he has been previously admitted to the bar by order of the supreme court of this state;" that this defendant engaged in "ambulance chasing," in direct contempt of this court, and did engage in the practice of stirring up strife and litigation, without respect for and in direct contempt of the power, dignity and authority of this court to regulate the conduct and practice of law in this state, and the due administration of justice therein, and of all other lawfully created courts of this state.

Defendant Hinckle admits the truth of the original information and the separate counts stated therein by failing to answer and deny the same, after having received due and proper notice.

This court, in *Nebraska Children's Home Society v. State*, 57 Neb. 765, 78 N. W. 267, held: "Where a contempt proceeding is instituted by information and a rule to show cause, it is the duty of the defendant to file an answer if he desires to traverse the facts charged. Failing on sufficient opportunity to so do, the court may treat the facts alleged in the information as confessed."

In defendant Hinckle's voluntary statement to the court, he admitted that for a long period of time he had been engaged in "ambulance chasing," and offered in mitigation thereof the fact that he was required to earn a livelihood and was ignorant of the seriousness of the offense, but he stated that he thought the practice was wrong, and he detailed some of his experiences which are not pertinent to this particular case.

" 'Ambulance chasing' is generally used to designate the

activities of those laymen who acquaint themselves with the occurrence of accidents and approach the injured persons or their representatives with a view toward soliciting employment for an attorney at law in the conduct of litigation arising from the accident." Annotation, 73 A. L. R. 401.

In the case of *Matter of Rothbard*, 225 App. Div. 266, 232 N. Y. Supp. 582, it was said: " 'Ambulance chasing' with its evils has been a matter of common knowledge for many years. The laymen, who were a part of it, were instrumental in stirring up litigation upon claims without merit, in falsely enlarging the amount of damages and in committing subornation of perjury. They procured retainers when the injured person was unable to appreciate his rights. * * * All in all, it became a low order of business, intolerable in the practice of a noble profession. Attorneys who associated with such men have been dull, indeed, not to understand what was going on, even if they did not actively participate. * * * As a result of these methods, * * * there developed an unwholesome business; relentless search for material gain had displaced love of duty; interest of client was subordinated to self-interest; sordid gain, instead of duty to state and client, motivated interest and activity." All of the things mentioned under this definition of "ambulance chasing" are included in the original information to which the defendant did not answer.

In *State v. Barlow*, 131 Neb. 294, 268 N. W. 95, this court held: "The supreme court is vested with the sole power to admit persons to the practice of law in this state and to fix the qualifications for admission to the bar" (Const. art. II, sec. 1; art. V, secs. 1, 25), and "possesses the inherent power to punish for contempt any person assuming to practice law within the state without having been duly licensed so to do." See, also, *State v. Daugherty*, 136 Neb. 490, 286 N. W. 783.

The practice of law is not confined to performing services in a proceeding, but also includes preparation of legal instruments. 7 C. J. S. 703. "In a larger sense, it includes legal advice and counsel, and the preparation of legal in-

struments and contracts by which legal rights are secured, although such matter may or may not be pending in a court. To 'practice law' is to carry on the business of an attorney at law; to do or practice that which an attorney or counselor at law is authorized to do and practice; to exercise the calling or profession of the law, usually for the purpose of gaining a livelihood, * * * to make it one's business to act for * * * others in legal formalities, negotiations or proceedings." 7 C. J. S. 703.

"One who confers with clients, advises them as to their legal rights, and then takes the business to an attorney and arranges with him to look after it in court is engaged in the practice of law." *State v. Perkins,* 138 Kan. 899, 908, 28 Pac. (2d) 765. See, also, *Depew v. Wichita Association of Credit Men,* 142 Kan. 403, 49 Pac. (2d) 1041.

"The practice of law in which laymen may not engage is not limited to practice in court proceedings, but comprehends all the activities of a lawyer in advising and assisting others in all matters of law, both in and out of court." *Rhode Island Bar Ass'n v. Automobile Service Ass'n,* 100 A. L. R. 226 (55 R. I. 122, 179 Atl. 139).

An all-embracing definition of the term "practice of law" would involve great difficulty. In the instant case, the practice of law would include consultation with persons receiving injury and damage by virtue of an automobile accident, apprising them of their rights and of the legal liability of other parties; advising them in procuring the services of certain counsel; arranging for taking a contract for a retainer, fixing the amount thereof, and advising such persons as to the cost to them in bringing and instituting the action, and also as to the amount of recovery. Mere nomenclature is unimportant.

"Where the application of legal knowledge and technique is required, the activity constitutes such practice * * * it is the character of the act and not the place where it is performed which is the decisive factor." *Shortz v. Farrell,* 327 Pa. St. 81, 193 Atl. 20.

In re Ripley, 109 Vt. 83, 191 Atl. 918, the court, in quoting

from *People v. People's Stock Yards State Bank*, 344 Ill. 462, 176 N. E. 901, said: "Practicing as an attorney or counselor at law, according to the laws and customs of our courts, is the giving of advice or rendition of any sort of service by any person, firm or corporation when the giving of such advice or rendition of such service requires the use of any degree of legal knowledge or skill."

The case at bar is the outgrowth of and is connected with previous cases involving attorneys for whom the defendant acted, and by whom he was employed. This court, in the exercise of its powers, disciplined such attorneys and, in passing judgment, treated the matter as an admonition to those engaged in such unethical practices and imposed a nominal punishment. We think this defendant is entitled to the same consideration.

We conclude that the defendant was guilty of the illegal practice of law, within the contemplation of section 7-101, Comp. St. 1929, and in view of the authorities herein cited. We further conclude that the defendant is guilty of a wilful attempt to obstruct and hinder the due administration of justice in proceedings had or proceedings pending before the courts of this state, in violation of section 20-2121, Comp. St. 1929.

The duly licensed, qualified, experienced practitioner, possessing high moral character and integrity, honestly abiding by the canon of ethics of a noble profession, and the public requiring their services are entitled, at the hands of the court, to a judgment that such nefarious practices, carried on by the defendant in this case, be stamped out and ended.

For the reasons given, and in consideration of all of the facts, the defendant, George E. Hinckle, is adjudged to be guilty of contempt of court and sentenced to the county jail of Lancaster county, Nebraska, for a period of 30 days; and time served in said jail since the date of arrest shall be made a part hereof and included in this sentence. The punishment imposed in the instant case is not to be considered as commensurate with the gravity of the offense in future cases of like character.

JUDGMENT ACCORDINGLY.

STATE, EX REL. CHARLES SMRHA, APPELLEE, V. COSMOPOLITAN OLD LINE LIFE INSURANCE COMPANY ET AL., APPELLEES: HERMAN F. GARTNER, INTERVENER, APPELLANT.

291 N. W. 72

FILED MARCH 22, 1940. No. 30626.

1. **Insurance.** A contract designated as a benefit thrift certificate, containing a savings feature and, in addition thereto, renewable term insurance for a period of 10 years, the terminal age of the contract, such insurance at all times being in excess of the amount of premium paid; the application attached to the certificate setting forth the place of birth, age, occupation, nationality, sex, marital status and beneficiary designation, and containing a proviso that the applicant agrees that the certificate issued on such application shall not take effect until the first payment has been received by the company during the good health of the applicant; the insurance, as shown in the contract, to be paid to a designated beneficiary upon death of the insured, on proper proof thereof, as required by the contract, and, in addition, the contract containing cash and loan values and a limitation upon the expense per unit during the life of the contract for payment of expenses of supervision and management of the company, and providing for options at the terminal age thereof for the paid-up policy of insurance on the life of the insured, based upon Experience Table of Mortality, with interest at 3½ per cent., without any charge for expense, is an insurance contract, within the meaning of the law of Nebraska governing such contracts.
2. ———. Term insurance is insurance for the term or period for which a premium has been paid, with the right to continue it from term to term upon payment of a proper premium; and where a contract contains both a thrift, or saving, feature and an insurance feature, the premium paid not being segregated but paying for both features of the contract, the fund created by the premium payments would be liable for all the company's obligation, such as death benefits, surrender value and thrift terminal settlements, the company recognizing the premium as covering all of such items.
3. ———. Where a life insurance company attempts to set up property rights and benefits out of the premium which it collects on its integrated obligation, the terms and conditions of such rights and benefits are required to be in accord with the provisions of section 44-602, Comp. St. 1929, and subdivision 11 of said section applies, thus granting to the certificate-holder

three years from the date of default therein in which to reinstate the contract, upon evidence of insurability satisfactory to the company and payment of arrears of premiums, with interest.

4. ———. Section 44-602, Comp. St. 1929, with reference to term insurance, contained in the contract under consideration, provides for setting up of benefits and conditions therein prescribed applicable to such contract, and any cash value which said contract may have is, by such statute, permitted to be used for extended insurance. Then, if such insurance shall be in force and the original contract shall not have been surrendered to the company and canceled, the contract may be reinstated within three years from such default, upon evidence of insurability satisfactory to the company and payment of arrears of premiums, with interest. These requirements govern the duty and obligation of the company, even though the provisions of the contract do not comply therewith.

APPEAL from the district court for Lancaster county: ELLWOOD B. CHAPPELL and JEFFERSON H. BROADY, JUDGES. *Reversed.*

Frank A. Peterson, for appellant.

John S. Logan, Perry, Van Pelt & Marti, C. J. Campbell and *Max Kier, contra.*

Heard before ROSE, PAINE, CARTER, MESSMORE and JOHNSEN, JJ., and ELLIS and WENKE, District Judges.

MESSMORE, J.

This case has been presented and argued to this court on three occasions. See *State v. Cosmopolitan Old Line Life Ins. Co.,* 136 Neb. 833, 287 N. W. 654.

The Lincoln Liberty Life Insurance Company, on April 19, 1938, filed application in the district court for Lancaster county, setting forth that the department of insurance of the state of Nebraska took possession of the property, records and effects of the Cosmopolitan Old Line Life Insurance Company (hereinafter referred to as the Cosmopolitan Company); that on December 12, 1936, the court directed the department to conduct the business of the company and

retain possession of its property, records and effects until the further order of the court; that on February 15, 1938, said court ordered the department of insurance and its director to liquidate the assets of the Cosmopolitan Company, and, pursuant to such order, the director of the department of insurance was authorized to enter into a reinsurance and servicing contract with the Lincoln Liberty Life Insurance Company, which contract was entered into on March 1, 1938, and became effective by order of the court on March 30, 1938; that on March 31, 1938, the insurance department was directed, as liquidator, to turn over to the Lincoln Liberty Life Insurance Company the property, records and effects of the Cosmopolitan Company, except the sum of $10,000, reserved for legal expenses; that, in compliance with said order, the transfer was made as directed by the court. The purpose of the application was to have the court consider the rights of certificate-holders, make specific findings and determine whether such certificate-holders should have the right and privilege to reinstate their certificates, and, if so, upon what terms and conditions.

A petition in intervention was filed on April 30, 1938, by Herman F. Gartner, for himself and all other certificate-holders similarly situated, setting forth the same historical subject-matter as appears in the application of the Lincoln Liberty Life Insurance Company, and, in addition thereto, the following pertinent facts: From 1926 to December 12, 1936, the Cosmopolitan Company issued to its members contracts, with combined savings and insurance features, described as thrift certificates, which provided for monthly payments of $1 per unit, a unit representing a payment of $120 over a 10-year period, or quarterly payments of $3 per unit, or semiannual payments of $6 per unit, or annual payments of $12 per unit, payable in advance. On December 12, 1932, intervener Gartner purchased 12 thrift units, providing for a payment of $120 on each unit by instalments over a period of ten years. He made payments to the Cosmopolitan Company for two years and eight months, totaling the sum of $384, and paying until August 12, 1935.

The increasing benefit thrift certificates contained the following language:

"In case the member fails to make his regular payments as prescribed on the face of this certificate, and in advance, he shall have thirty days grace from the date the payment became due, during which period this certificate shall remain in good standing. The unpaid amounts completing the current year's payments shall be deducted from any settlement under this contract.

"If the member fails to make the payments, prior to the expiration of the thirty-day grace period, this certificate shall automatically lapse; provided, that in case the lapsed member desires to reinstate this certificate he may do so within two years from the date the last payment became due by paying an amount equal to all overdue payments plus six per cent. compound annual interest thereon."

Intervener Gartner further alleged that, by reason of the department of insurance taking possession and control of the property, records and effects of the Cosmopolitan Company, he did not, and could not, pay his premiums and reinstate his certificate during said period from December 12, 1936, to August 12, 1937, and did not, and could not, procure the loan or cash surrender value of his certificate; that doubt, uncertainty and confusion existed as to the legal rights and status of the company; that intervener had no satisfactory assurance that the company or the insurance department could lawfully reinstate the certificate, and uncertainty existed as to the safety of his investment and the ability of the company to carry out the terms of the certificate contract; that on August 11, 1937, the date on which the two-year reinstatement period expired, intervener had a loan or cash value, under the terms of the certificate, of $103.58; that under the strict terms of the certificate this amount was lost to him. Intervener prayed that the court determine that he and all other certificate-holders similarly situated have not forfeited their rights under their certificates, and that they shall have a reinstatement period equal to the time that was left to them for reinstatement

subsequent to the 12th day of December, 1936, and for such other relief as may be just and equitable.

George J. Wagner filed a petition in intervention and answer to the petition in intervention of Herman F. Gartner, denying the right of Gartner and certificate-holders similarly situated to reinstatement; alleged that in April, 1932, he purchased from the Cosmopolitan Company five units similar in all respects to the units purchased by Gartner. The crux of his contention follows: The certificate in question contains the following specific provisions under paragraph 5 thereof:

"The Company agrees to extend special services to all members as follows: * * *

"(b) To pay to the holder hereof at the terminal age of this certificate, or to any one designated by a court of competent jurisdiction to act for him, or to any person, firm or corporation designated by any one so authorized in his settlement application, the same day his application for settlement is received except not earlier than the terminal age date, a sum of money computed as follows: (as evidenced by the table appearing in the certificate which need not be here set out.) * * *

"3. His proportionate share of the money left in the fund by reason of lapse of other holders of such certificates, together with the interest accumulations thereon, compounded annually, plus," etc.

The answer further alleged that the intervener Wagner paid premiums as required by the certificate, has kept the same in full force and effect, and is entitled to its benefits, as disclosed by the preceding paragraph herein.

The department of insurance and director thereof, as liquidators of the Cosmopolitan Company, filed answer to the petition in intervention of Herman F. Gartner, admitting the material allegations of fact contained in such petition, and alleging that, after the department of insurance had taken over the property, records and effects of the Cosmopolitan Company, the department received an order from the district court for Lancaster county, then exercising

jurisdiction over the proceeding, directing and restricting the operation and management of the Cosmopolitan Company. This order was copied into the answer and authorized the insurance department to examine, adjust and pay all proper death claims and annuities under the contracts of said company due and owing it, and the remaining unpaid thrift contracts, which matured December 1, 1936, upon the same basis as established by the company; to receive all authorized payments tendered by contract holders or debtors, and to take the necessary steps to collect and receipt for all interest and principal payments on any investments, contracts or choses in action now held for the benefit of the company; in general, to do any and all things needful for the proper conduct of the company. This order was unappealed from and became and was the directing law of the case.

The decree of the district court of October 17, 1938, declared that by the terms of the certificate of intervener Herman F. Gartner the certificate lapsed and was without force and effect at the expiration of 30 days of grace, following the date of August 12, 1935. The court further found that the reinstatement period of the certificate expired August 12, 1937, and it became null and void, and the intervener was without right to reinstate the same; further, that during the reinstatement period from August 12, 1935, to August 12, 1937, intervener Gartner was possessed of the right and privilege of reinstating his certificate by making payment to the Cosmopolitan Company as provided by the terms of the certificate; that the department of insurance conducted the business of the Cosmopolitan Company from December 12, 1936, until the order of liquidation made on February 15, 1938. Intervener Gartner appealed.

The record discloses, in addition, the following: Intervener Gartner did not make application for a loan during the period the company was under the charge and direction of the insurance department. Death losses and annuities were paid, as well as premiums on contracts accepted. No loans were made to certificate-holders, but applications were

received and filed. Any loans made would have to be by authority of the court, as stated by the department of insurance. After the department had taken over the business of the company, intervener Gartner was permitted to pay in the amount of $72 in three instalments of $24 each, thereby, presumably, paying on his contract to August 12, 1935. The department refused to make loans to the owners of thrift certificates as provided by the terms thereof.

The question with which we are directly concerned is whether or not the contract in the instant case is an insurance contract, within the meaning of the law of this state governing such contracts.

A careful examination of the contract discloses the following insurance features incorporated therein: The first page of the certificate binds the company "for and in consideration of the warranties contained in the application herefor * * * and of the payment to the Company of the monthly premium specified in the margin hereof," to pay to his wife, the beneficiary. The application attached to the certificate executed by Gartner sets forth his place of birth, age, occupation, nationality, sex, marital status and beneficiary designation; containing the following provision: "I agree that the certificate issued hereon shall not take effect until the first payment has been received by the company during my good health." The amounts to be paid are designated as monthly, quarterly, semiannual or annual payments, thus making payment of premiums optional and not strictly monthly. The contract designates that the company "agrees to pay to Hulda Look Gartner, beneficiary, related to the member as wife, upon satisfactory proof of death of the member while this certificate is in full force and effect, twelve times the amount shown by column (4) of the Table of Values herein to be insured on the date of member's death, less any indebtedness hereon, in cash in one lump sum, or such optional settlement provided for herein as the member shall have last specified in written notice to the Company, * * * ." Section 11 of the contract provides for the filing of proofs of death and designates how the proofs shall be made,

and refers to column 4 of the table of values, determining the amount of insurance per unit for each year of the contract.

Section 6 contains language as follows: "The following table shows the cash value, loan value, and the amount of insurance protection under this certificate, each while this certificate is in good standing and before the expiration of the grace period. Amounts shown are per unit of this certificate as specified on the face hereof; hence multiplied by the number of units hereof." Column 1 contains the year, first, second, third, etc.; column 2 the annual premium; column 3 the amount paid per unit each year; column 4 amount insured; column 5 cash or loan value. Column 4 shows an increase in amount insured over amount paid each year. Under "General Provisions," after the word "Basis," appears this language: "1. This certificate is based upon renewable term insurance for a period of ten years." Under "Expense Limited:" "3. The Company agrees that not more than $28.00 per unit shall be allotted during the life of this contract to the General Fund for payment of all expenses of supervision and management." Under "Options: Terminal Age Settlement:" "Option One: Conditioned upon satisfaction of the Company of insurability of the applicant, a paid-up policy of insurance on the life of applicant, for an amount equal to One Thousand Dollars ($1,000.00) per unit of the certificate to be surrendered, for a period which the amount of the cash settlement would buy as a single premium under the American Experience Table of Mortality and three and one-half per cent. interest, without any charge for expense (loading); or,—

"Option Two: Conditioned upon satisfaction of the Company of insurability of the applicant, a paid-up policy of insurance on the life of applicant, for the period of his life and for an amount which the cash settlement would buy as a single premium under the American Experience Table of Mortality and three and one-half per cent. interest, without any charge for expense (loading)."

There is no denial that this contract carries insurance

features as hereinbefore set out. The contention is that the insurance features are incidental to the contract; that the true function of the contract is evidenced by section 5 thereof, in substance as follows:

"The Company agrees to extend special service to all members as follows:

"(a) To act as trustee for all holders of this class of certificates, as a whole, for their payments as specified on the face of their respective certificates, after deducting that proportion of the payments allotted for expense of supervision and management and the net premium on the amount of insurance in force the current year under each respective certificate, which resultant amount, together with interest accumulations thereon, shall be the basis for the fund known as the Cumulative Endowment Fund, which shall constitute the Surplus of the Association belonging to the holders of this class of certificates;

"(b) To pay to the holder hereof at the terminal age of this certificate," etc. (under endowment accumulations).

"1. The entire amount he has placed in the Cumulative Endowment Fund, plus,—

"2. His proportionate share of the net interest earnings on said fund compounded annually, plus,—

"3. His proportionate share of the money left in the fund by reason of lapse of other holders of such certificates, together with the interest accumulations thereon, compounded annually, plus,—

"4. His proportionate share of all surplus interest earned on the funds of such members who withdraw before arriving at their terminal age, plus,—

"5. His proportionate share of all withdrawal values forfeited by beneficiaries who upon death of such member surrender the certificates for insured settlements, plus,—

"6. His proportionate share of all interest earnings compounded annually on all such withdrawal values forfeited by beneficiaries.

"7. Also a participation in any saving in expense of supervision and management as determined by the Board of Directors.

"Payable in cash in one lump sum if no other option stated."

The foregoing provisions of the contract refer to the thrift or savings feature incorporated therein and the advantage of lapsations to those who complete the contractual obligation. The insurance benefits provided by the certificate are in the amount of $15 a year per unit and increase $15 yearly.

" 'Term insurance' * * * is insurance for the term or period for which a premium has been paid, with the right to continue it from term to term upon payment of the proper premium." 37 C. J. 362.

The contention of appellee is: There is no reserve created on term insurance; no medical examination is required of the certificate-holder; no evidence of insurability is requested; the price per unit of the certificate does not vary according to the age of the certificate-holder, and the customary requirements of an insurance policy in such respects are missing. It is contended that the real purpose of the contract is to provide an attractive and desirable means of investing money over a period of years.

The appellee relies upon the case of *Howie v. Cosmopolitan Old Line Life Ins. Co.*, 132 Neb. 367, 272 N. W. 207, quoting at length the language of this court in reference to the same kind of a contract. However, a careful reading of the *Howie* case is at once convincing that the cause was brought upon the theory that the plaintiff could recover at law the cash value of her policy. The plaintiff in that case purchased a certificate of membership for two units in the Cosmopolitan Old Line Life Insurance Company October 29, 1926, and paid monthly premiums thereon from that date to and including July 29, 1931. Nothing was claimed under the reinstatement provision in the policy. The table of values provided that at the fifth year, if the certificate was in good standing, and before the expiration of the grace period, the owner of the certificate might withdraw $39.70 for each unit. Plaintiff sued for $79.40 and made no demand upon the defendant for payment of the cash value,

as evidenced by the contract, until February 21, 1935.

The right to reinstate the policy within two years, as provided in the contract in the instant case, was not involved in the *Howie* case; nor the question, whether or not the contract was an insurance contract, within the meaning of the law of this state and subject to subdivision 11, sec. 44-602, Comp. St. 1929, which would give to the contract-holder the period of three years within which to reinstate an insurance contract. The plaintiff had been in default almost four years. It was unnecessary, in any event, for the court to determine the kind of contract involved. The question was not an issue in the case. The court in the *Howie* case affirmed an order of the district court entering judgment for the defendant company on the pleadings and dismissing the action.

Appellee refers to the case of *Whaley v. Matthews,* 134 Neb. 875, 280 N. W. 159. It is true the opinion in that case did discuss the provisions of the contract as they applied to a holder at terminal age of the certificate and how the money was to be computed. The report disclosed that in the last three years about $65,000 came from the cumulative endowment fund, and the additional excess payment of $90,000 came from the general fund. The bulk of the business of the company consisted of thrift units. It was said in the opinion: "As a result of the alleged unwarranted action of the company in taking money from these two funds to pay substantial bonuses to already matured thrift certificates, those funds have been depleted so that it is claimed to have jeopardized payments of certificates to mature later;" the opinion stating that it was proper, under the circumstances, for the insurance department to step in and take over the control of the company. The court determined the duty of trustees, misapplication of funds of mutual companies, the liability of a director of the corporation and the relation a director bears to the stockholders. The court, in no event, determined the question presented in the instant case, and the holding therein would not be disturbed by an interpretation of the contract here involved.

The appellee's contention, therefore, develops this proposition: From each year's certificate payment the company bought enough insurance on the life of the certificate-holder to provide the amount of insurance for the particular year, as stipulated in the table of values, paragraph 6 of the contract. Other than this net deduction, coupled with a proportionate share of management and supervision, the entire remainder went into the trust fund. To provide extended insurance and cash surrender values would have required that the company violate the express terms of its contract with reference to the cumulative endowment fund. The carrying out of the conditions of the thrift certificate to intervener, as well as to other certificate-holders, required that only the net cost of the insurance during the particular year be deducted from the contract payment; that is, the intervener Gartner must claim, in order to be entitled to reinstatement, that the amount which he contributed to the cumulative endowment fund should be applied to the purchase of extended insurance. Such purchase, if made by the company, could only have been at the expense of the intervener's contribution to the cumulative endowment fund.

Our attention is directed to paragraph 16 of the contract, on the theory that the distribution of surplus, as well as the loan and insurance values provided therein, is based upon premiums, rather than upon the American Experience Table of Mortality.

Analyzing the contention of the appellee, it follows that there can be no extended insurance, cash or loan value, where, upon date of default, the policy does not possess any reserve or net value. The insurance features are separate and distinct from the savings feature of the contract, and were added as a further inducement to facilitate the sale of such certificates. Therefore, the contract provided for term insurance only. No reserve was built up after default in payment of premiums. There was no value remaining in the contract to purchase extended insurance or maintain the contract. The period of reinstatement must be limited

to the privileges expressed in the contract. The cash values thereunder arise by virtue of payments made to secure investment advantages. Cash values, not being accretions under the insurance feature of the contract and not being a part of the insurance reserve, are subject only to the stipulations of the contract providing for lapsation and forfeiture. With the foregoing contention and general summary thereof we cannot agree.

It is clear that the Cosmopolitan Old Line Life Insurance Company is a mutual reserve company. Section 44-101, Comp. St. 1929, defines insurance as follows: " 'Insurance' is a contract whereby one party called the 'insurer,' for a consideration undertakes to pay money or its equivalent, or to do an act valuable to another party called the 'insured' or to his 'beneficiary' upon the happening of the hazard or peril insured against, whereby the party insured or his beneficiary suffers loss or injury,"—in the instant case in the event of death of the insured.

Section 44-306, Comp. St. 1929, reads: "All domestic insurance companies, and insurance agent, solicitor, broker, surveyor or adjuster doing business in this state, and all insurance business transacted in whole or in part within or outside of this state, the subject and matter of which is located wholly or in part in this state, shall be subject to and be governed by this article, and the records of such insurance company, agent, solicitor, broker, surveyor or adjuster doing business in this state shall be subject to inspection and examination of the department of trade and commerce." A reading of the contract involved herein indicates clearly the adaptability thereto of the section of the statute quoted.

Recognizing that the insurance feature designated by the contract is 10-year term insurance, we believe there is a reserve value, although not stated in the policy, but the cash and loan values are made up from the value of the policy, including any profits, savings in load expense, and mortality, and other items which are included in the premium of every policy, whether term or otherwise. Term

policies, such as the 10-year term policy here considered, do have a cash value, as evidenced by the table of values shown in the contract, and the reserves are, by necessity, kept in force by each policy, so that obligations under such policies can be met when due. In a mutual company, such as the Cosmopolitan Company, appellee herein, the profits of the contract containing an insurance feature, as herein discussed and considered, belong equitably to the policyholders, and no reason exists why cash, loan and surrender values cannot be maintained on such policies, depending on the loading in the premiums charged, on savings, on mortality, and other profits. Such a cash value has been placed on these policies.

We refer to section 44-401, Comp. St. 1929, as amended by chapter 96, Laws 1935, which defines life insurance as insurance "upon lives of persons, including endowments and annuities, and every insurance pertaining thereto and disability benefits." The contract in the instant case falls within this definition. We also refer to section 44-602, Comp. St. 1929, which requires that every policy of life insurance, "except policies of industrial insurance or where the premiums are payable monthly or oftener," shall contain, among other things, provisions for nonforfeitable loan and surrender values and for extended insurance. Subdivision 11 of such section requires a provision in the policy that "if, in event of default in premium payments, the value of the policy shall be applied to the purchase of other insurance, and if such insurance shall be in force and the original policy shall not have been surrendered to the company and canceled, the policy may be reinstated *within three years* from such default, upon evidence of insurability satisfactory to the company and payment of arrears of premiums with interest." (Italics ours.)

The insurance obligation in the contract, together with the thrift feature thereof, was paid for by the same premium. The fund credited by the premium payments would be liable for all of the company's obligations, such as death benefits, surrender value and thrift terminal settlements; in

other words, the premium covered both insurance and thrift features, and the company so recognized. When the company attempted to set up property rights and benefits out of the premium which it collected on its integrated obligation, the terms and conditions of such rights and benefits were required to be in accord with the provisions of section 44-602, Comp. St. 1929. Said section, with reference to term insurance, as disclosed by Gartner's contract, provides for the setting up of the benefits and conditions therein prescribed which are applicable to such contract. Loan and surrender values cannot be set up with a forfeiture provision, and any cash value which a policy may have may be permitted to be used for extended insurance, and if such insurance shall be in force, and the original policy shall not have been surrendered to the company and canceled, the policy may be reinstated within three years from such default, upon evidence of insurability satisfactory to the company and payment of arrears of premiums, with interest. These requirements govern the duty and obligation of the company, even though the provisions of the policy did not comply with them. See Comp. St. 1929, sec. 44-602.

Intervener Gartner was entitled to have any cash value which the company had credited as of August 12, 1935, out of the premiums of his contract, applied to the purchase of other insurance in the amount then in force under the policy; to have his original contract reinstated upon evidence of insurability satisfactory to the company and payment of arrears of premiums, with interest. If the surrender value would not have purchased extended insurance, required to reinstate the contract, as shown by the evidence in this case, or if Gartner was no longer a desirable risk, then the opportunity should be accorded the company to show such facts.

Our former opinion, reported in 136 Neb. 833, 287 N. W. 654, is vacated; the judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED.

ELLIS, District Judge, concurs in the result.

JOHNSEN, J., concurring separately.

To me, the controlling question in this case is one of public policy. Shall an insurance company be permitted to collect premiums on a life insurance obligation, create cash values out of the money collected, and then confiscate or forfeit such rights on a premium default? I think not. The law abhors forfeitures generally, and in the case of insurance contracts they are quite intolerable.

The fact that the contract in this case was labeled a "thrift certificate" and combined a savings and insurance feature should not enable the company to dodge the statutes regulating the conduct of life insurance business or escape the rules of construction applicable to such contracts. Whether the company subsequently chose to make separate allocations on its records for thrift benefits and insurance costs is of no importance here. No such apportionment was made in the contract itself. The certificate-holder had no insurance protection except upon payment of the premium as an entirety. Since the insurance obligation rested upon the consideration of payment of the whole premium, it remained an insurance premium throughout. Any cash or surrender values created out of it were cash or surrender values derived from insurance premiums and could not be confiscated or forfeited by any contractual provision in conflict with the insurance statutes or rules of law applicable to insurance contracts. Not being forfeitable, such values were available for the purchase of extended insurance, with the accompanying right to reinstatement of the contract recognized by the statute.

The contention is made—and is accepted in the dissenting opinion herein—that no reserve was set up in connection with the insurance feature of the contract and that there was nothing therefore that could be used for the purchase of extended insurance. As to the allocations made by the company on its records, I find no evidence in the record. It is quite inconceivable to me, however, that a company would assume a ten-year insurance risk without creating a reserve against the hazard. The point, however, is quite immaterial

here, because, as I have already stated, the question is not what the company did on its records, but what it did in its contract. The contract sets up specific cash or surrender values out of premiums collected. These values were rights which could not be forfeited by any attempted apportionment or private bookkeeping on the part of the company.

I have previously expressed my views more fully in the dissenting opinion in *State v. Cosmopolitan Old Line Life Ins. Co.*, 136 Neb. 833, 839, 287 N. W. 654, 657, and I shall not repeat them here. The general public policy involved is to me more vital than the number of certificate-holders who may be affected by the present litigation.

PAINE, J., dissenting.

I respectfully dissent from the last opinion adopted by a majority of the court. This is a most difficult case. It was first argued to this court on April 4, 1939, with five judges sitting, two of our number being disqualified.

The court failing to adopt an opinion by the vote of four of the five judges sitting, it was reargued on June 8, 1939, with District Judges Lightner and Landis sitting as members of the court, and an opinion was adopted, and released September 29, 1939, which is found in 136 Neb. 833, 287 N. W. 654, in which two members dissented, and in which opinion a full discussion of the case will be found.

This opinion held: "A court of equity cannot grant relief against the clearly expressed condition contained in a valid 'benefit thrift certificate' issued by an insurance company, which provides that reinstatement of a lapsed certificate can only be had by the payment of past-due monthly instalments, with interest, within two years from the date the last payment became due."

Later a rehearing was granted, and the third argument occurred December 4, 1939, and the decision of the case hinges on whether the contract is to be considered as a thrift certificate or a life insurance policy, or contract. Let us examine the exhibits. On December 12, 1932, Dr. Gartner signed an instrument, at the top of which, printed in large capital letters, were the words, "Application for Thrift

Certificate." On examination of the instrument he purchased, we find on the outside it is "No. 67136," "Units Twelve," *"Increasing Benefit Thrift Certificate,"* issued to Herman F. Gartner, and on the inside the largest letters at the top of this contract, except for the name of the company, are the words, "Thrift Certificate." It seems rather surprising that, when intervener Gartner signed a written application for a "thrift certificate," and received a "thrift certificate," and is now bringing action on the "thrift certificate," this court should find that he applied for, and received, and now holds, an *insurance* contract.

This thrift certificate did not agree to pay a certain specified sum of money at the termination of the ten-year period, but undertook to pay him the $120 he would have paid in on each unit, with interest on the sums paid in, and, as in all "thrift" certificates, agreed to pay him the distributive share of the money forfeited by unfortunate certificate-holders who had lapsed in making their payments, together with the interest accumulations thereon, being those who had allowed the two-year period of reinstatement provided in the certificate to go by without reinstating their contracts, and also to pay him "his proportionate share of all withdrawal values *forfeited by beneficiaries* who upon death of such member surrender the certificates for insured settlements," together with "his proportionate share of all interest earnings compounded annually on all such withdrawal values *forfeited by beneficiaries.*"

Can it be argued that the owners of these lapsed thrift certificates, written on a plan which has been forbidden in many jurisdictions, and which are no longer written in Nebraska, are entitled to all the protection given, under our law, to the holders of *bona fide* life insurance policies?

It should be clear that, if the holder of a certificate calling for certain thrift certificate units died, his beneficiary could continue to make payments on the thrift certificate, but if the beneficiary needed funds and selected to accept the so-called "life insurance" settlement, the beneficiary would thereby forfeit comparatively large sums of money,

as hereinabove set out. It would be abhorrent in a life insurance policy to read that a beneficiary who wanted payment in cash would be compelled to forfeit a portion of the principal and also interest accumulations. There is no question that the insurance department would forbid the writing of such an insurance policy.

The basic idea from its very inception had been to sell thrift contracts in which the benefits from lapsed certificates profited those who continued to pay. Of this there should be no doubt. The fact that the plan was amended, and an attempt made to promote sales of these thrift certificates by adding a very slight, yearly renewable, term insurance feature, without planning for any reserve to protect it, and in which the beneficiary could in no event draw more than $150 on a unit in which the owner of such unit had paid in the full sum of $120 over a period of ten years, does not, in my opinion, exempt a certificate-holder from being bound by the two-year provision of the contract which he applied for and received. To permit him, after he has failed to reinstate within the two years provided in his contract, to now avail himself of the provision of law which governs and protects *bona fide* life insurance policyholders, and to reinstate under certain conditions within three years, as set out in section 44-602, Comp. St. 1929, is in my opinion unjust and inequitable.

This litigation is carried on between two interveners. Dr. Gartner represents that small group which owns 1,876 certificates, representing 6,709 units, who have discontinued their payments, and have permitted their certificates to lapse under the terms of their contracts, and have not reinstated the same within the two years provided by their contracts. On the other hand, Dr. George J. Wagner, the appellee-intervener, represents in a way a large body of 7,824 certificate-holders, who have met every required payment according to the terms of their contracts, and now hold 40,708 units. It has always been my understanding of the law that, where there is no uncertainty as to the meaning of a contract, it will be enforced as made by the parties.

I believe that the decision of the trial court was right. The case was tried in the district court before J. H. Broady and E. B. Chappell, district judges, who rendered their decree, holding:

"(7) That intervener, Herman F. Gartner, failed to reinstate his said certificates within the time and in the manner provided by their express terms and that he lost all his rights thereunder and that his petition is without equity and should be dismissed.

"It is, therefore, by the court ordered, adjudged and decreed that intervener, Herman F. Gartner, and all other holders of certificates in Cosmopolitan Old Line Life Insurance Company similarly situated, who have permitted the reinstatement period of their said lapsed certificates to expire by failure to make payments as required by the terms of their said certificates, have lost all rights under their said certificates and that their said certificates are null and void and that said petition of said intervener, Herman F. Gartner, on behalf of himself and all other certificate-holders similarly situated, is without equity and should be and the same hereby is dismissed. Objections of George J. Wagner sustained."

Now, to the contrary of this holding, the effect of the majority opinion now adopted, as I view it, is to permit the few holders of lapsed thrift contracts to escape the two-year limit to reinstate, as provided by the contracts they purchased, and to allow them an extra year to reinstate, to the end that they can take from the faithful and diligent contract-holders who kept up every payment comparatively large sums of money specifically due the latter under the exact terms of their thrift contracts.

ALFRED SHELLENBARGER ET AL., APPELLANTS, V. ARTIE H. SHELLENBARGER, APPELLEE.

291 N. W. 95

FILED MARCH 22, 1940. No. 30803.

1. **Costs.** Where plaintiff's action is for a recovery of money only, costs shall be allowed of course to the plaintiff upon a judgment in his favor, as contemplated by section 20-1708, Comp. St. 1929.
2. **Cases Distinguished.** The cases of *Moore v. Darrow*, 11 Neb. 462, 9 N. W. 637; *Rosenbaum v. Dunston*, 16 Neb. 111, 19 N. W. 610; *Wilde v. Boldt*, 16 Neb. 539, 20 N. W. 849, and cases of like holding, decided under the language of section 621 of the original Code, Gen. St. 1873, distinguished.

APPEAL from the district court for Richardson county: VIRGIL FALLOON, JUDGE. *Reversed.*

Harold L. Gurske, for appellants.

Armstrong & McKnight, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

MESSMORE, J.

The plaintiffs brought this action in the county court of Richardson county to recover a money judgment in the amount of $502.18, with interest. The defendant, by cross-petition, alleged an offset to plaintiffs' amended petition, and prayed judgment against plaintiffs in the sum of $15.97. The county court entered judgment in favor of the plaintiffs for $200, and defendant appealed to the district court. The district court tried the cause on the original pleadings filed in the county court and returned a judgment in favor of the plaintiffs and against the defendant in the sum of $112.05, and further ordered and decreed that plaintiffs pay the costs of appeal and costs in the district court in the sum of $39.20, and that each party pay his own costs incurred in the trial of the cause in the county court. The plaintiffs filed a motion in the district court to retax costs.

Whitall v. Cressman, 18 Neb. 508, 26 N. W. 245. This motion was overruled June 27, 1939. Plaintiffs appeal.

The plaintiffs properly selected the forum in which to bring this action. Const. art. V, sec. 16. See sections 27-506, 27-502, Comp. St. 1929.

The defendant relies on the cases of *Moore v. Darrow,* 11 Neb. 462, 9 N. W. 637; *Rosenbaum v. Dunston,* 16 Neb. 111, 19 N. W. 610; *Wilde v. Boldt,* 16 Neb. 539, 20 N. W. 849, and cases of like holding. The foregoing cases were decided under the language of section 621 of the original Code, which reads as follows: "If it shall appear that a justice of the peace has jurisdiction of an action, and the same has been brought in any other court, the plaintiff shall not recover costs." Gen. St. 1873, sec. 621. Jurisdiction in such cases is determined by the amount of the recovery and not by the amount claimed. Therefore, the defendant contends the plaintiffs are not entitled to recover costs in the district court; they brought this action in the county court for $502.18 and recovered in the district court a judgment for $112.05; it appears that the justice of the peace had jurisdiction; therefore, the language of section 621 of the Code is pertinent.

With this contention we cannot agree. Section 621 of the original Code was finally amended by section 4, ch. 152, Laws 1923; that part necessary to set out reading as follows: "If it shall appear that a justice of the peace has jurisdiction of an action and the same has been brought in *district court* the plaintiff shall not recover costs." (Italics ours.) The action in the instant case was brought in the county court, the proper forum for such case, and section 621 of the Code as amended in 1923, now section 20-1709, Comp. St. 1929, does not apply.

In addition to the foregoing contention, the defendant relies on section 20-1711, Comp. St. 1929, which reads: "In other actions the court may award and tax costs, and apportion the same between the parties on the same or adverse sides, as in its discretion it may think right and equitable." This provision of the statute is not applicable in the instant

case, for the reason that the case at bar is an action for the recovery of money only, and section 20-1708, Comp. St. 1929, is pertinent. Said section reads: "Where it is not otherwise provided by this and other statutes, costs shall be allowed of course to the plaintiff, upon a judgment in his favor, in actions for the recovery of money only."

For the reasons given in this opinion, the cause is reversed, with directions to the district court to enter judgment against the defendant and in favor of the plaintiffs for costs incurred in the district court; that part of the court's judgment, to divide the costs in the county court, is vacated, and the costs allowed of course, within the contemplation of section 20-1708, Comp. St. 1929.

REVERSED.

HELEN WELCH V. PAUL FALK: DAVE FALK ET AL., APPELLANTS: PAGE LUMBER & HARDWARE STORE, INC., APPELLEE.
291 N. W. 488

FILED MARCH 29, 1940. No. 30794.

Homestead. Where a judgment has become a lien against real estate and subsequently a right of homestead attaches thereto, the lien of the judgment is not displaced and remains paramount to the claim of a homestead exemption.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

James P. Marron, for appellants.

Norman Gonderinger, Charles D. Hitch and *W. J. Hammond, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

SIMMONS, C. J.

This appeal involves the question of whether or not a judgment is a lien superior to a claim of homestead against the undivided one-seventh interest of the defendant Dave Falk in a half-section of land in Holt county, Nebraska.

The facts recited in this paragraph are not disputed. Matilda Caroline Falk, the owner of the one-half section of land here involved, died September 29, 1933. Each of her seven children, including the defendant, Dave Falk, inherited an undivided one-seventh interest in the property. The probate of her estate has been completed. The defendant, Page Lumber & Hardware Store, Inc. (formerly J. E. Smith Lumber Company), hereinafter called the judgment creditor, on February 26, 1934, obtained a judgment in the county court of Holt county for $971.25 against the defendants Dave Falk and his wife, Joy Falk. On February 27, 1934, this judgment was transcripted to the district court for Holt county, and duly recorded in the judgment records. Several executions were issued (the last on December 2, 1936), which were returned unsatisfied. The judgment has not been paid.

Defendant Dave Falk contends that his interest in the real estate is not subject to the lien of appellee's judgment for the reason that, prior to the recording of the judgment in the district court for Holt county, he, his wife, and family had occupied the premises as a homestead, that such occupancy has continued at all times since, and that his interest is exempt from the judgment lien to the extent of $2,000.

The judgment creditor contends that its judgment is a lien upon the undivided interest of Dave Falk in the premises; that Dave Falk went into possession after its judgment lien attached, and under a lease from the administrator, and that its judgment is superior to the alleged homestead lien.

The lien of the judgment attached to any real estate subject thereto on February 27, 1934. Comp. St. 1929, sec. 27-532; *Work v. Brown,* 38 Neb. 498, 56 N. W. 1082.

The trial court found that Dave Falk and wife had no right of homestead exemption as against the lien of the judgment and entered a decree that the judgment was a lien against the undivided interest of the defendant Falk.

The defendants Dave Falk and his wife filed a motion for a new trial for the reasons that the decision is not sup-

ported by sufficient evidence and is contrary to law. Defendants also alleged newly discovered evidence. The motion for a new trial was overruled, and defendants appeal.

The defendant Dave Falk testified that he was married and the father of two children; that he purchased a house in Page, February 15, 1934, that on February 16 he moved it onto the premises, moved his family thereon February 19, and has resided there since; that he bought and moved the house upon the premises with intent to occupy the same as a home. He offered in evidence a receipt for $40, dated February 15, 1934, reciting "payment on house."

On March 2, 1934, he entered into a written lease with the administrator of his mother's estate, whereby he leased for one year the part of the premises which he occupied and claims as a homestead. He testified that he moved the house onto the premises before he entered into the lease.

Mrs. Falk corroborated her husband as to the dates of purchase of the building, the moving it onto the premises, and the date of occupancy. Four witnesses who assisted in the moving testified for the defendants. One of these corroborated the defendant positively as to dates. Of the other three, one testified that the house was moved "in the spring" —he "would say" "in February;" another, "it was along in February, I would judge;" another, "it was in February, I imagine," that was "what the other folks have said, and that is my recollection." None of the last three testified positively as to dates.

Paul Falk, a brother of the defendant, testified for the judgment creditor that he had a verbal lease, made in February, 1934, with the administrator for the entire half-section; that on or about the 2d or 3d of March, 1934, the administrator, the attorney for the estate, and the defendant called upon him and asked that he surrender a part of the land and allow the defendant to lease it, that the defendant wanted to move away from the land where he was then living, and that "it would protect the heirs." The witness agreed that the defendant could have a part of the land and that the lease would be dated back to March 1.

The defendant was cross-examined as to this conversation, and, while admitting that they "evidently" had the conversation, repeatedly answered that he did not remember either the substance of the conversation or when it took place, and "couldn't say" that he had moved the buildings onto the place at the time of the conversation. The witness Paul Falk positively testified that the defendant moved the buildings onto the land after the conversation, about the middle of March. The witness further testified that both he and the defendant were in possession of the land under leases from the administrator and accounted to him for rents until the estate was closed in 1936.

Mr. Wilbur, vice-president of the judgment creditor, testified that the buildings were not on the premises on February 26, nor for several days thereafter; that he saw the building being moved from Page; that it was after the judgment was entered, probably within thirty days thereafter.

Therefore, there was a clear-cut dispute in the evidence, both as to the time the defendant conceived the plan of moving upon the premises, and as to the time that he actually moved thereon. The trial court heard this testimony, observed the witnesses, their manner of testifying, and obviously resolved the questions of fact in favor of the judgment creditor, and against the defendants. We have carefully reviewed the record and reach the same conclusion.

Where a judgment has become a lien against real estate and subsequently a right of homestead attaches thereto, the lien of the judgment is not displaced and remains paramount to the claim of a homestead exemption. *Bowker v. Collins,* 4 Neb. 494; *Paxton v. Sutton,* 53 Neb. 81, 73 N. W. 221; 3 Neb. Law Bulletin, 148; 29 C. J. 860; 13 R. C. L. 615, sec. 75; *First State Bank of Gackle v. Fischer,* 67 N. Dak. 400, 272 N. W. 752, 110 A. L. R. 878, and cases there cited.

The conclusion here reached makes it unnecessary to determine the contentions of defendants that a homestead may be had in real estate under the facts here existing.

We have examined the showing of newly discovered evi-

dence. It was not discussed in defendant's brief. We will not detail it. Were that evidence before us, it would not change the conclusion here made.

The judgment of the trial court is

AFFIRMED.

JEWEL TEA COMPANY, INC., ET AL., APPELLEES, V. CITY OF GENEVA ET AL., APPELLANTS.
291 N. W. 664

FILED MARCH 29, 1940. No. 30755.

1. **Municipal Corporations.** The only power which a city has to declare the house-to-house solicitation of customers is a nuisance is to find that it interferes with the health, peace, order, and good government of the city.
2. ———. When an ordinance attempts to prevent one from engaging in a lawful and legitimate occupation, such an ordinance can be impeached as unreasonable, unconstitutional and void.
3. **Nuisance.** "The act of soliciting order for sale of goods in and upon private residences without consent of owner or occupant is not a 'public nuisance' and may not be punished as a crime or misdemeanor." *Prior v. White*, 132 Fla. 1, 180 So. 347.
4. **Municipal Corporations.** "The exercise of the police power by a municipal corporation must be directed towards and have a rational relation to protection of a basic interest of society rather than the mere advantage of particular individuals and must be reasonable and free from arbitrariness." *N. J. Good Humor, Inc., v. Board of Commissioners*, 11 Atl. (2d) 113.
5. ———. The ordinance under examination is not regulatory, but preventative and prohibitive as against an act which is innocent in itself, and which does not constitute a public nuisance.
6. ———. "Municipal power encroaching upon individual rights does not exist unless plainly conferred by the city charter or other law." *State v. Wiggenjost*, 130 Neb. 450, 265 N. W. 422.
7. **Constitutional Law.** "A state may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them." *Jay Burns Baking Co. v. Bryan*, 264 U. S. 504, 44 S. Ct. 412, 68 L. Ed. 813.

APPEAL from the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

Waring & Waring, for appellants.

Harry A. Spencer and *Dwight W. Dahlman, contra.*

J. A. C. Kennedy, Yale C. Holland, George L. De Lacy, Edward J. Svoboda, Ralph E. Svoboda, Robert K. Adams, S. J. Leon, Fred S. White and *Louis E. Lipp, amici curiæ.*

Heard before SIMMONS, C. J., ROSE, PAINE, CARTER, MESSMORE and JOHNSEN, JJ., and ELLIS, District Judge.

PAINE, J.

A petition was filed, praying for a declaratory judgment that a certain ordinance was void, and asking, among other things, for injunction restraining the enforcement of such ordinance against solicitors and peddlers by the city of Geneva. To this, the city of Geneva and its officers filed an answer, containing several admissions and a general denial. Plaintiffs' demurrer to this answer was sustained by the court, and the city of Geneva and its officers appeal.

The Jewel Tea Company, Inc., the Grand Union Tea Company, Inc., and Larry A. Wadhams filed a petition of 18 pages against the city of Geneva and its mayor and all of its officers, setting up that on January 3, 1938, the city adopted ordinance No. 146, a portion of which reads as follows:

"Section 1. The practice of going in and upon private residences in the city of Geneva, Nebraska, by solicitors, peddlers, hawkers, itinerant merchants, and transient vendors of merchandise, not having been requested or invited so to do by the owner or owners, occupant or occupants of said private residences, for the purpose of soliciting orders for the sale of goods, wares and merchandise, and/or peddling or hawking the same, is hereby declared to be a nuisance, and punishable as such nuisance as a misdemeanor."

The ordinance provided that upon conviction for violation the offender should be fined not less than $25 nor more than $100 and costs.

It is further alleged in the petition that Larry A. Wadhams, plaintiff, as agent of the Jewel Tea Company, visits his regular customers in Geneva every two weeks, calling at a specified time of day arranged by agreement with the customer, and that all calls made by said Wadhams are for one or all of the following purposes: (1) To deliver merchandise previously ordered; (2) to take or solicit orders, in accordance with the standing agreement and understanding with each of said customers, for merchandise to be subsequently delivered; or (3) to collect amounts from said customers legally due to the Jewel Tea Company. It is alleged in said petition that plaintiffs do not solicit any orders for any merchandise upon the public streets, nor do plaintiffs hawk or peddle any merchandise of any nature in said city; that there are outstanding balances due the Jewel Tea Company of approximately $100, and that there is $50 due the Grand Union Tea Company, from their customers in said city.

It is further charged, in the fourteenth paragraph of said petition, in effect, that the mayor and city attorney have repeatedly forbade the plaintiffs from carrying on their business in Geneva, and have threatened both the agent and district manager that they, or their representatives, would be arrested and prosecuted for every stop or call made upon their customers in Geneva, and that said plaintiffs must discontinue their business in Geneva, and that said mayor and city attorney intend to put the Jewel Tea Company and Grand Union Tea Company out of business in the city of Geneva.

In paragraph 18 it is alleged: "If the said Jewel Tea Co. is prevented from making the regular calls provided for in the contracts between said company and its customers, said plaintiffs will lose the good will of said customers built up over the past twenty-five (25) years, and substantial and valuable property rights of said plaintiffs will be destroyed;" and similar allegations were made in reference to the Grand Union Tea Company.

It is also alleged in said petition that the defendant city,

through its marshal, on instructions from the mayor, arrested Earl R. Slattery, salesman for the Grand Union Tea Company, on February 1, 1939, at a time when he was calling on a regular customer, and upon trial he was convicted of violating said ordinance No. 146; that the marshal of said city, on instructions of the mayor, also arrested Larry A. Wadhams, plaintiff, on March 28, 1939, while he was calling upon his customers of the Jewel Tea Company, and that his trial is set for hearing April 11, 1939, and the plaintiffs therefore pray that the court issue an order temporarily restraining the defendants and each of them from arresting or prosecuting the said agents of the Jewel Tea Company, or Grand Union Tea Company, for soliciting orders in Geneva, and that the court render a declaratory judgment, decreeing that said ordinance is invalid, void, and unconstitutional, and at the trial make the temporary injunction permanent against the city and its officers.

The defendants filed an answer, admitting that the Jewel Tea Company and the Grand Union Tea Company are duly incorporated, and that the city of Geneva is a city of the second class, and denied each and every other allegation contained in said petition except certain admissions hereinafter made.

The defendants further allege in the answer that on March 28, 1939, the plaintiff Larry A. Wadhams, in violation of the ordinances of the city of Geneva, without having been requested or invited so to do, entered upon the premises of occupants and owners of private residences of the city of Geneva for the purpose of soliciting orders for the sale of goods, wares and merchandise; that a complaint was duly filed against Wadhams; that said action was set for trial, and shortly before trial the petition of the plaintiffs was filed, and defendants allege that the plaintiffs have a complete, full, and adequate remedy in said criminal case now pending in court entitled, "The State of Nebraska, City of Geneva vs. Larry A. Wadhams."

It is further stated that Earl R. Slattery, as alleged in plaintiffs' petition, was an agent or employee of the Grand

Union Tea Company; that he entered upon premises of residents of the city of Geneva to solicit orders for merchandise without having been invited so to do, for which violation of the ordinance he was arrested and found guilty in the police court, and that said Slattery has appealed from his conviction to the district court for Fillmore county, and defendants aver that the plaintiff Grand Union Tea Company has a full, complete, and adequate remedy at law in the criminal case which is now pending in the district court for Fillmore county, entitled "The State of Nebraska, City of Geneva vs. Earl R. Slattery."

It is further alleged that the said Jewel Tea Company and the said Grand Union Tea Company are, in truth and in fact, peddlers of groceries within the city of Geneva, and "that at irregular periods they employ salesmen who drive up and down the streets and alleys of said city with automobiles. That these salesmen follow the practice of canvassing from house to house within said city. That the said salesmen of plaintiffs' companies call upon residents of said city whether invited or uninvited at hours in the day and night time, and that said practice is in truth violation of said ordinance set forth in plaintiffs' petition."

It is further alleged that the petition of plaintiffs does not set forth and allege facts sufficient to require this court to exercise its discretion to enter a declaratory judgment decree, and the defendants, having fully answered plaintiffs' petition, pray that they may go hence without day and recover their costs expended.

To this answer of the city of Geneva and its officers, the plaintiffs filed a general demurrer, which the court sustained, and the defendants declining to plead further, the court found that said defendants and each of them are in default of answer, and that the allegations of plaintiffs' petition are true, and that the plaintiffs are entitled to a permanent injunction from the enforcement of ordinance No. 146, as prayed in said petition, from which order the defendants appeal.

In the briefs prominence is given to the fact that the

ordinance in the case at bar is practically the same as one adopted by the town of Green River, Wyoming, except as to the one clause, "for the purpose of disposing of," which was found in the Green River ordinance, but is not found in the ordinance as set out in the transcript in the instant case. However, for all practical purposes the two ordinances are identical, and we will hereafter refer to the ordinance as the Green River ordinance.

It is necessary to briefly trace the history of this Green River ordinance in the various courts which have considered its validity, especially because its discussion is the major point in the briefs in the case at bar.

Shortly after the town of Green River adopted this ordinance, it was tested in the federal court in the case of *Fuller Brush Co. v. Town of Green River*, 60 Fed. (2d) 613, decided July 15, 1932. Judge Kennedy said the question was difficult to solve, largely on account of the lack of precedent, but held that the ordinance in question was an arbitrary regulation in excess of the police power, not based upon any theory of the protection of the health, safety, morals, or general welfare of the citizens of the community, and was a violation of the constitutional rights of the plaintiff.

This conclusion is very similar to that reached by Judge Carter in holding that "A citizen clearly has the right to engage in any occupation not detrimental to the public health, safety and welfare." *Carolene Products Co. v. Banning*, 131 Neb. 429, 268 N. W. 313.

Upon appeal of the Green River ordinance case to the circuit court of appeals for the tenth circuit, Lewis, J., delivered the opinion, released in 1933, found in 65 Fed. (2d) 112, 88 A. L. R. 177, reversing and dismissing the action, holding that the Green River ordinance was an appropriate exercise of police power, and that it did not operate as an unlawful interference with interstate commerce, and that the police power extends to the prohibition of peddling and selling of goods by itinerant merchants and transient vendors.

Thereafter, under this Green River ordinance, J. L.

Bunger, a salesman for the Fuller Brush Company, was arrested and convicted of a violation of the ordinance, and his conviction in the district court for Sweetwater county, Wyoming, was appealed to the Wyoming supreme court, and the opinion is found in *Town of Green River v. Bunger*, 50 Wyo. 52, 58 Pac. (2d) 456, being released in 1936. The chief justice, in writing the opinion, discussed the decision of the tenth circuit court of appeals, where the ordinance had been upheld as a valid regulation, and affirmed the conviction as a proper exercise of local police regulation in punishing uninvited visitation of private residences by solicitors for the sale of merchandise as a misdemeanor. See, also, *McCormick v. City of Montrose*, 99 Pac. (2d) (Colo.) 969.

But many other courts, after considering this same ordinance, have reached a different conclusion. The town of Bel Air, Maryland, enacted the Green River ordinance. The Jewel Tea Company filed a bill for a writ of injunction to restrain the officers of the town from enforcing the ordinance, to which the town of Bel Air demurred, and the demurrer being sustained, the Jewel Tea Company appealed to the court of appeals of Maryland. The bill alleged that officers of the town not only arrested their agent, Marshall, but had threatened to arrest any agents of the plaintiff if they attempted to serve their regular customers, or to secure new customers. It is said in *Jewel Tea Co. v. Town of Bel Air*, 172 Md. 536, 192 Atl. 417, that municipalities derive whatever powers they possess from the legislature; that they do not have any inherent rights,—they are all delegated, and may be changed, limited, enlarged, or taken away by a successive session of the general assembly; that the only power the town of Bel Air has to declare the solicitation of customers to be a nuisance is to find that it interferes with the health, peace, order, or good government of the town. The court finds that it has no relation thereto, but that it discriminates against the nonresident, and in favor of resident business, and thus violates the Fourteenth Amendment to the Federal Constitution.

In November, 1933, the city council of Orangeburg passed the Green River ordinance, and O. R. Farmer, a solicitor for the Fuller Brush Company, was convicted of violating the ordinance. Upon appeal to the court of general sessions, it was held that the ordinance in question was reasonable and valid as a matter of law, from which decision an appeal was taken to the supreme court of South Carolina. In the opinion (*City of Orangeburg v. Farmer,* 181 S. Car. 143, 186 S. E. 783), it is said that formerly questions of the reasonableness or unreasonableness of an ordinance were up to the legislative body enacting the law, and only when they were in conflict with constitutional statutory inhibitions would the same be declared void, but that, because of changed conditions, the court in the case of *City of Columbia v. Alexander,* 125 S. Car. 530, 119 S. E. 241, 32 A. L. R. 746, held that, where an ordinance attempted to prevent one from engaging in a lawful and legitimate occupation, such an ordinance could be impeached as unreasonable. "It cannot be denied that the enforcement of the ordinance will seriously impair, if not destroy, the defendant's lawful business. Upon its face that appears to have been the purpose of the ordinance."

The opinion in *City of Orangeburg v. Farmer, supra,* states: "The ordinance declares that the mere soliciting of the sale of merchandise in and upon private residences is a nuisance, and levies a penalty upon such facts shown. The penalty is not based upon the conduct of the salesman, nor is the same based upon any valid shown reason of protecting the public health, nor is any other fact required save and except an act which in itself is legitimate. * * * The occupation of soliciting orders from house to house is a lawful one when conducted in a proper manner. * * * Measured by the standards laid down in this court, the ordinance is unreasonable, unconstitutional on this ground, and void."

On April 13, 1937, the town council of Culpeper, Virginia, enacted the Green River ordinance, and the defendant, John H. White, was tried and convicted in the justice court. He appealed to the circuit court, waived a jury, and was tried

upon an agreed statement of facts, in part as follows: J. H. White, a solicitor for the Real Silk Hosiery Mills, Inc., an Illinois corporation, with its executive office located in Indianapolis, Indiana, solicited for the sale of hosiery and lingerie, the customer signing an order, which was mailed to Indianapolis, from which place the merchandise was sent to the customer by parcels post C. O. D. Similar orders had been solicited in the town of Culpeper for more than 15 years. If the customer was a new one, he would call at the customer's private home, present a small token or gift, and ask permission to call and show his samples the next day or later, at which time he would solicit the order. The defendant was at all times courteous, gentlemanly, and considerate, never offensive nor unduly insistent, "nor were any of his acts or practices dangerous, offensive, unhealthy, or unsafe, either as relating to the general public or the person or persons upon whom the defendant called."

Upon appeal to the supreme court in this case of *White v. Town of Culpeper*, 172 Va. 630, 1 S. E. (2d) 269, the court said that the warrant upon which the defendant was tried was procured by the town sergeant, and there was an utter lack of evidence of complaint upon the part of any of the householders of the town. It is said that, if the validity of the ordinance is upheld, it must be upon the ground that the evil at which it is aimed is a public nuisance, for if the visit of the solicitor merely offends the householder it would be a private nuisance, not punishable as a crime, citing 2 Dillon, Municipal Corporations (5th ed.) note to section 684, and several other authorities. The action of the circuit court was reversed, and the defendant discharged from custody.

An earlier case, involving a solicitor for the same company, came up from the city of Richmond, California, to the federal court, which held that an ordinance deprived the company of the liberty of contract and of property without the due process of law. *Real Silk Hosiery Mills v. City of Richmond*, 298 Fed. 126.

An exhaustive discussion of the Green River ordinance

was written in 1938, and is found in *Prior v. White,* 132 Fla. 1, 180 So. 347, which involved the conviction of a solicitor under this ordinance enacted by the city of New Smyrna, Florida. An original habeas corpus proceeding was brought in the supreme court. It was held that an ordinance imposing a penalty for mere solicitation of orders without invitation or request was unreasonable, unfair, and oppressive as applied to a solicitor taking orders for the sale of goods. It was further found:

"3. Unless a householder manifests externally in some way his wish to remain unmolested by the visits of solicitors, the solicitor may take custom and usage as implying consent to call where such custom and usage exist, as regards validity of ordinance declaring mere soliciting of orders for sale of merchandise, without request or invitation of householder, a nuisance and imposing a penalty for violation of ordinance."

"4. The act of soliciting order for sale of goods in and upon private residences without consent of owner or occupant is not a 'public nuisance' and may not be punished as a crime or misdemeanor."

"6. A municipality cannot, by an attempted exercise of its general police powers, prohibit mere soliciting of orders for sale of merchandise in and upon private residences without consent of owner or occupant, except perhaps as to householders who have in some way indicated that solicitation of business or certain designated types of business at their homes is not allowed."

"7. An ordinance declaring mere soliciting orders for sale of goods in and upon private residences without consent of owner or occupant a nuisance and imposing a penalty for violation of ordinance invades solicitor's constitutional rights."

In one of the briefs in the case at bar, our attention is called to the case of *N. J. Good Humor, Inc., v. Board of Commissioners,* 123 N. J. Law, 21, 7 Atl. (2d) 824, decided in June, 1939, as supporting the city of Geneva in the instant case. It appears that an ordinance made it unlawful

to sell ice cream within the municipality from house to house, and conviction for such violation was affirmed. In the opinion it is said that the ordinance prohibiting the peddling of ice cream was not unreasonable, arbitrary, or capricious, but rather a restriction only on the manner or method of sale, and while the one who actually did the selling was immune from arrest as an honorably discharged veteran, his personal immunity did not extend to his employer. But the case did not end there, for seven months later a certiorari was allowed from this decision by the court of errors and appeals of New Jersey, and on January 25, 1940, with three judges dissenting, the former judgment of the supreme court was vacated, and complaint dismissed. See 11 Atl. (2d) 113. In this last opinion it was held that an ordinance prohibiting house-to-house merchandising was not justified under the home rule act as a measure to insure the peace and quiet of a residence community, nor was the ordinance justified as a police regulation of public safety. The court said: "The exercise of the police power by a municipal corporation must be directed towards and have a rational relation to protection of a basic interest of society rather than the mere advantage of particular individuals and must be reasonable and free from arbitrariness."

The latest cases we have been able to find involving the Green River ordinance were released January 30, 1940, and March 12, 1940, and are *City of McAlester v. Grand Union Tea Co.*, 98 Pac. (2d) (Okla.) 924, and *De Berry v. City of La Grange*, 8 S. E. (2d) (Ga. App.) 146. It is said that the federal circuit court of appeals, in *Fuller Brush Co. v. Town of Green River, supra*, held the act to be a nuisance, but did not determine whether the nuisance was public or private. In conclusion, it holds the ordinance is not regulatory, but preventative and prohibitive as against an act innocent in itself, and without surrounding facts and circumstances that would constitute the act a public nuisance, and that substantial and irreparable injury would result from its enforcement.

Because of existing and widespread unemployment, there is doubtless an increase in the number of townspeople who are attempting to support themselves by means of house-to-house solicitation in the sale of hosiery, brushes, ready-to-wear garments, groceries, home-baked products, cosmetics, and magazines, and of farmers in the sale of eggs, butter, poultry, milk, and other farm products. It is argued with considerable support that, when a house-to-house salesman becomes successful in any of these lines, he has thereby established a property right which is protected by the Constitutions of the United States and the state of Nebraska. It is admitted that such house-to-house solicitation may be a petty annoyance to some householders, but this can be prevented by a sign, which is seen in many apartment houses, "No solicitors allowed."

In Nebraska, a city of the second class is given authority by the legislature in section 17-454, Comp. St. 1929, reading in part as follows: "Preserving the Peace, Designation of Nuisances in Residence District. XXV. To prevent and restrain riots, routs, noises, disturbances or disorderly assemblages; to regulate, prevent, restrain or remove nuisances in residential parts of municipalities and to designate what shall be considered a nuisance."

We find nothing in this act which gives the city of Geneva the right to "define" a nuisance, as the legislature used the word "designate," which means to name or point out.

"Municipal power encroaching upon individual rights does not exist unless plainly conferred by the city charter or other law." *State v. Wiggenjost*, 130 Neb. 450, 265 N. W. 422. See, also, *Interstate Power Co. v. City of Ainsworth*, 125 Neb. 419, 250 N. W. 649; *Gray v. City of Omaha*, 80 Neb. 526, 114 N. W. 600.

Somewhat akin to this is the statement in *State v. McMonies*, 75 Neb. 443, 106 N. W. 454: "It is familiar law that the power given a municipality to 'regulate' does not authorize it to suppress or prohibit a trade or business, as the very essence of regulation is the existence of something to

be regulated." See 1 Dillon, Municipal Corporations (4th ed.) sec. 89.

A municipality has no power, under its general authority, to prohibit as a nuisance an occupation which is not a nuisance in fact. *Ex parte Harris*, 97 Tex. Cr. 399, 261 S. W. 1050.

Nor can the police power be exerted arbitrarily to interfere with private business, or to prohibit lawful occupations, or to impose unreasonable or unnecessary restrictions upon them under the guise of protection of the public. *Corporation of Toronto v. Virgo*, 73 Law Times Rep. 449.

In *Jay Burns Baking Co. v. Bryan*, 264 U. S. 504, 44 S. Ct. 412, 68 L. Ed. 813, the supreme court of the United States held invalid a Nebraska statute which involved an unreasonable restriction through the bread weight law, and held: "A state may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."

Judge Rose said: "To acquire the means of supporting life by honest labor and skill is an inherent right of a law-abiding citizen and municipal restrictions thereon do not exist unless authorized and imposed in plain terms of the law." *State v. Wiggenjost, supra.*

"No doubt one may visit another's place of business from no other motive than curiosity, without incurring liability, unless he is warned away by placard or otherwise. So every man, by implication, invites others to come to his house as they may have proper occasion, either of business, of courtesy, for information, etc. Custom must determine in these cases what the limit is of the implied invitation." 2 Cooley, Torts (4th ed.) 238, sec. 248.

"A mere legislative declaration that a business or occupation, harmless and innocuous in itself, is inimical to the public interest, cannot make it so, nor render a restrictive ordinance valid, unless by reason of surrounding conditions the declaration can be said to accord with the fact, as based upon common observation and human experience." *Yee Gee v. City and County of San Francisco*, 235 Fed. 757.

"But there is no question but that, when a municipal corporation has been authorized by its charter to pass ordinances to remove and prevent nuisances, it may, for the preservation of public health, safety and convenience, provide the manner in which property within its limits shall be used, and prevent a different use of it, by fine and force if necessary. But such ordinances must not be arbitrary or unreasonable, and must clearly be for the preservation of the public health, safety or convenience." 2 Wood, Nuisances (3d ed.) 978, sec. 745.

The ordinance of the city of Geneva, under examination in the case at bar, is both prohibitory and penal in its character. It affects both personal and property rights. The power given such city to "designate" what may be public nuisances cannot be construed as including a power to absolutely prohibit legitimate business which may be pursued as of common right.

A very large number of courts, from states widely scattered, have held that the Green River ordinance is invalid and void, and not a justifiable exercise of the police powers of a city, and therefore deprives persons engaging in such business of their constitutional rights. The act which the ordinance declares to be a public nuisance is, in fact, either no nuisance at all, or in any event only a private nuisance.

In the opinion of the court, there is no aspect of a declaratory judgment in this case, and it has been considered as one seeking injunctive relief only.

Having reached these conclusions, our court accepts the logic and reasoning of the majority of courts which have passed upon this question, and the judgment of the trial court, granting a permanent injunction against the enforcement of ordinance No. 146, is hereby affirmed.

AFFIRMED.

MESSMORE, J., dissenting.

The city of Geneva is a city of the second class, as defined by the law of Nebraska. Section 17-454, Comp. St. 1929, which outlines the powers of municipalities of the class to which the city of Geneva belongs, provides: "To regulate,

prevent, restrain or remove nuisances in residential parts of municipalities and to designate what shall be considered a nuisance." Obviously, the foregoing language, which does not admit of equivocation, is a legislative power granted to the city.

In the case of *Richardson v. Braham,* 125 Neb. 142, 249 N. W. 557, this court said: "Power to act and reasonableness of action are proper tests of the validity of laws, ordinances and regulations." The city, by passing the ordinance in question, obviously intended to exercise the police power of the city, and it is not for this court to interfere with its enforcement unless its unreasonableness or want of necessity for such measure is shown by satisfactory evidence. Under well-established rules, where a municipality enacts an ordinance, pursuant to authority expressly granted, all presumptions are in favor of its validity. When an ordinance is enacted under police power and its validity is to be determined, the court, in determining its validity, will assume that the city council acted with knowledge of the conditions relating to the particular test. The test in appraising the exercise of the municipal power is whether, under the conditions present in the municipality, the exercise of the admitted power to declare nuisances is unreasonable, arbitrary or capricious.

" 'In the exercise of police power delegated by the state legislature to a city, the municipal legislature, within constitutional limits, is the sole judge as to what laws should be enacted for the welfare of the people, and as to when and how such police powers should be exercised.' *State v. Withnell,* 91 Neb. 101." *Hawkins v. City of Red Cloud,* 123 Neb. 487, 243 N. W. 431.

Primarily, local authorities are entrusted with the regulation of such matters and not the courts. The reason is obvious. The local authorities know the necessities of local situations. We must assume, then, that the council of the city of Geneva had before them all the facts with reference to the annoyance, disquietude and inconvenience occasioned to householders, caused by uninvited solicitors. I do not

believe that the ordinance here questioned, or its enforcement, directly or indirectly, encroaches upon the plaintiffs' constitutional rights. The ordinance does not prohibit or interfere, in any respect, with plaintiffs' rights or privileges of selling wares, goods and merchandise. Plaintiffs are free to carry on a business of that sort except as to the manner of soliciting orders as specified in the ordinance. Obviously, it could do so in many ways other than by disturbing the residents of the city, as prohibited by the ordinance. The objective sought by the ordinance is to denounce a particular practice of the plaintiff corporation and their solicitors or agents. They go uninvited, against the wishes of at least some of the occupants of the dwellings in the city, in and upon private premises and homes, to there solicit orders for goods, contrary to the express provision of the ordinance.

It has been uniformly held that. while legislative authority may not arbitrarily interfere with private affairs by imposing unusual and unnecessary restrictions upon a lawful business, yet a considerable latitude of discretion must be accorded to the law-making power, and if the legislation operates uniformly upon all persons similarly situated, and it is not shown that it is clearly unreasonable and arbitrary, it cannot be judicially determined to be in contravention of constitutional rights.

In the case of *Town of Green River v. Fuller Brush Co.*, 88 A. L. R. 177 (65 Fed. (2d) 112), it was held: "A municipal ordinance prohibiting, under penalty, solicitors and itinerant venders from making uninvited calls at private residences in pursuit of their occupation, is an appropriate exercise of the police power, and therefore does not deprive such solicitors and venders of their property without due process of law, or deny the equal protection of the laws." See *Town of Green River v. Bunger*, 50 Wyo. 52, 58 Pac. (2d) 456.

The ordinance questioned in the above case affirmed is analogous to the ordinance in the instant case. In order to comprehend the effect of the above holding, and in view of

our previous statements, it might be well to summarize what the city council of Green River obviously had in mind, being acquainted with all of the local conditions, as the reason for enacting the ordinance. The dogged, tenacious and sometimes pugnacious determination with which salesmen have literally thrown themselves through residential portals and at householders, the transient nature of their principal place of business, their lack of financial responsibility in many instances, and an hourly and very general tendency to defraud the unwary, must have borne considerable weight in the minds of those who have been instrumental in putting such regulatory legislation upon the ordinance books of municipalities.

It is true, as stated in the majority opinion, that, due perhaps to economic conditions, more persons are engaged in house-to-house soliciting than ever before in the history of this country. Doubtless, the city council had this fact in mind and recognized that, in the ringing of the door bell or knocking at the door four or five times a day, and often in the evening, without reference to what the householder might be doing, he or she was compelled to answer the bell and listen to a sales talk, without opportunity to compare values, or postpone buying, compelling the householder to buy, against an inner voice of discretion which tells her to wait until she can compare values. I believe that practices of like character have become so general and common as to be of judicial knowledge, and that the frequent ringing of door bells of private residences by venders and solicitors is becoming a nuisance to the occupants of homes. The ordinance in question does not mean that only a merchant, with a fixed place of business, may sell his wares; the legislation is aimed exclusively at the manner in which the goods are sold. The ordinance does not prohibit the sale of merchandise from door to door, but only the uninvited solicitation from door to door. Ordinances like and similar to the one in question have been approved in the following cases: *Town of Green River v. Fuller Brush Co., supra*; *Town of Green River v. Bunger, supra*; *City of Shreveport v. Cun-*

ningham, 190 La. 481, 182 So. 649; *Commonwealth v. Gardner,* 133 Pa. St. 284, 19 Atl. 550.

The validity of the ordinance in question has been challenged in that it contravenes the due process of law. The court has left the phrase undefined, leaving its determination to rest with each individual case as it arises. The test seems to swing, as do so many of our legal tests, with the pendulum of reasonableness. Although it has been intimated that the police power extends only to interests of public health, safety, peace and morals, the more correct view seems to be that it has now grown to include matters of general welfare and convenience. The police power knows no definite limits; it extends to every possible phase of what the courts deem to be the public welfare. It is a general right on the part of the public authority to abridge the rights of individuals and control their conduct, in so far as the same may be made necessary for the securing of the public convenience. Is the scope of this ordinance beyond this modern conception? I believe not. A peddling nuisance ordinance might well be construed to be within the legitimate police-power province, were it to rest alone on the public convenience.

December 11, 1939, the supreme court of Colorado determined a case involving the validity of an ordinance similar to the one in the instant case; adopted the reasoning of *Town of Green River v. Bunger, supra,* and *Town of Green River v. Fuller Brush Co., supra,* with the exception that the Colorado court did not determine the case by declaring such practice of soliciting a nuisance, but upheld the ordinance as a proper exercise of the police power, in harmony with the present trend to extend the police power to permit its exercise for the comfort, convenience and general welfare of society; and specifically held that said ordinance, prohibiting solicitation of retail business at private residences, without the request or invitation of the householders, does not violate due process clauses of state or federal Constitutions; that a city ordinance, prohibiting the soliciting of retail business in private residences, with-

out the request or invitation of the householders, does not constitute regulation of or interference with interstate commerce, within the terms of the federal Constitution. See *McCormick v. City of Montrose*, 99 Pac. (2d) (Colo.) 969.

The validity of the ordinance has been further attacked because it denies equal protection of the laws. Equal protection does not mean that all persons, regardless of circumstances, shall be treated the same. Persons may be grouped into classes. If the classification is reasonable, and if the rights and liabilities associated with each class are uniform within that class, there is no basis for constitutional condemnation on the ground that there is a deprivation of the equal protection of the laws. I need not repeat the reasons for the enactment of the ordinance. Much has been written on the subject, and there is an unwarranted fear that, by sustaining ordinances of this character, we may go far afield in denying persons the right to make a livelihood. Such a statement is capable of more than one construction. One of such constructions would be that a man's home is still his castle, and the mere fact that he has a sidewalk leading up to the door is not an open invitation to solicitors or salesmen who are uninvited. The general conception is that such accommodations are for invited guests.

I have not reviewed the effect of the pleadings and the general demurrer to the answer containing a general denial, as well as statements of fact as to the manner in which plaintiffs solicit business in the city of Geneva, and shall not enlarge on it in this dissent except to say that the demurrer admits the allegations of the answer, that the plaintiffs were violating the ordinance. The allegations of the answer assert that plaintiffs were solicitors and peddlers of merchandise, that they called indiscriminately on householders in the city at irregular intervals, without being invited. In view of the pleadings and under the circumstances, as I view them, I am unable to see a constitutional bar, or other legal reason why the ordinance in question cannot be sustained.

ROSE, J., concurs in the dissent.

GLADYS CARNES, APPELLEE, V. PAUL DEKLOTZ, APPELLANT.
291 N. W. 490

FILED MARCH 29, 1940. No. 30757.

1. **Evidence.** The speed of an automobile is not ordinarily a matter of exclusive expert knowledge and skill, and any witness with a knowledge of time and distance is competent to give an estimate.
2. ———. "Where it appears that a witness had no reasonable time, means, distance or opportunity to formulate a basis for an opinion as to the speed of a car, the testimony of such witness is insufficient to sustain a finding of excessive speed in the absence of other evidence on the subject." *Bergendahl v. Rabeler*, 133 Neb. 699, 276 N. W. 673.
3. **Appeal.** Where there is other evidence in the record sufficient to sustain the finding by the jury of excessive speed, it is ordinarily not error to permit an eyewitness to estimate the speed of an automobile, although the usual foundational requirements have not been in all respects met.
4. **Negligence.** Although a person may have negligently exposed himself or his property to an injury, nevertheless, if the defendant, after discovering his exposed situation, negligently injures him or is guilty of negligence in not discovering his dangerous position in time to avoid the injury, and injury results because thereof, he may still recover.
5. **Appeal.** The verdict of a jury based upon conflicting evidence will not be disturbed unless clearly wrong.

APPEAL from the district court for Lancaster county: ELLWOOD B. CHAPPELL, JUDGE. *Affirmed.*

O. B. Clark, for appellant.

Chambers, Holland & Locke and *T. J. Kiesselbach, contra.*

Heard before SIMMONS, C. J., ROSE, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

CARTER, J.

This is an action to recover damages for injuries sustained in an automobile collision. From a verdict and judgment for plaintiff for $1,550 the defendant appeals.

The evidence shows that the plaintiff was driving north into the village of Cortland, Nebraska, on highway No. 77, when her automobile collided with that of the defendant

approaching from the north. The accident occurred at the intersection of highway No. 77 with the main street of Cortland. Plaintiff testifies that she intended to turn west into the village, but says she has no recollection as to what happened and is unable to reconstruct the accident because of the injuries which she received. Defendant says that he was driving south on the highway and as he approached the intersection he saw plaintiff's car coming down the highway straddling the center line. When he got within a hundred feet or so of her car, he testifies that plaintiff's car "drifted" over on his side of the highway and that he had no opportunity to avoid the accident. The evidence is quite definite to the effect that plaintiff's car was not traveling in excess of 20 miles per hour. The speed of defendant's car was estimated at various speeds ranging from 25 to 70 miles per hour.

The record further shows that the village of Cortland was engaged in the installation of new water mains and lines, and as a result the entrance to main street from the highway was barricaded, except for a fifteen-foot opening in the center of the street. There were numerous warning signs along the highway, including the red flags ordinarily used to indicate temporary dangers. There is evidence that some of the dirt from the ditching operations had been carried onto the highway pavement by the traffic passing over it which would affect the usual braking efficiency of a car on a paved street. The evidence shows that there were tire burns on the pavement for a distance of 80 feet north of the place of the impact made by defendant's car.

It is the contention of plaintiff that defendant was operating his car at a high and excessive rate of speed through the village of Cortland, and that he failed to have his car under proper control. It is also alleged that defendant had the means at hand to avoid the accident and negligently failed to do so. The defendant denies the allegations of the petition, and alleges that plaintiff negligently turned her car into the path of defendant's car, and that such act was the sole cause of the accident. It was upon these issues that

the cause was submitted to the jury, which resulted in a verdict for the plaintiff.

Defendant complains of error by the trial court in permitting one Douglas to give his opinion as to the speed of defendant's car. His testimony was to the effect that the brakes caused a high squeal which attracted his attention. As he turned around he observed the two cars coming together when only 20 feet apart. From this foundation he estimated the speed of defendant's car at 35 to 40 miles per hour. While the witness had no reasonable time, means, distance or opportunity to formulate a basis for an accurate opinion as to the speed of defendant's car, yet in describing what he saw as the cars came together would require a cursory estimate of speed even if no opportunity to accurately estimate it existed. The impression of the witness as to speed is ofttimes essential to a fair interpretation of his testimony. The vagueness of such an opinion must necessarily go to the weight of his evidence and not to its admissibility. In the final analysis it resolves itself into a question of the sufficiency of the evidence to sustain a verdict, rather than the competency of the witness to testify. There was much evidence in the record bearing upon the rate of speed at which defendant's car was being driven. If the only substantial evidence in the record were that of this witness, we would be inclined to a different view. But, with ample additional evidence in the record to sustain the verdict, we hold that the admission of the witness' cursory opinion as to speed was not error. We have examined the holding in *Bergendahl v. Rabeler*, 133 Neb. 699, 276 N. W. 673, and other cases cited, and we think they are in line with the disposition made in the present case. The applicable rule is: Where it appears that a witness had no reasonable time, means, distance or opportunity to formulate a basis for an opinion as to the speed of a car, the testimony of such witness is insufficient to sustain a finding of excessive speed in the absence of other corroboratory evidence on the subject.

Defendant contends that it was error for this trial court

to submit the issue formulated by the pleadings that plaintiff was operating her car in a careful and prudent manner and that defendant did not keep a proper lookout, for the reason that there was no evidence introduced on the subject. It is the rule, of course, that issues not sustained by competent evidence should not be submitted to the jury. But all the facts and circumstances existing immediately before and at the time of the accident were before the jury in the instant case. Clearly, such evidence is sufficient to warrant the trial court in submitting these issues to the jury even though there may have been no direct evidence offered. Such issues are often determinable only from the circumstances and conditions existing when the accident occurred. We think the court properly submitted these issues to the jury.

There is ample evidence in the record to sustain a finding that either or both of the parties were negligent. We do not deem it necessary to discuss at length the comparative negligence of the parties, in view of the fact that the last clear chance doctrine was invoked by the plaintiff. There is evidence in the record that plaintiff did drive her car onto the left-hand side of the highway and into the path of defendant's car. There is also evidence in the record from which the jury might find that defendant saw plaintiff's car in his path at a time when he could have avoided the accident in the exercise of ordinary care. If the defendant was traveling at the rate of 25 miles per hour, as he testified, the jury certainly had a reasonable basis for invoking the last clear chance doctrine. It is true that the evidence is conflicting, but it is such that the jury's finding thereon is final. The applicable rule is: "Although a party may have negligently exposed himself to an injury, yet, if the defendant after discovering his exposed situation negligently injures him, or is guilty of negligence in not discovering his dangerous position until too late, and the plaintiff is because thereof injured, he may nevertheless recover." *Omaha Street R. Co. v. Martin*, 48 Neb. 65, 66 N. W. 1007; *Wilfong v. Omaha & C. B. Street R. Co.*, 129 Neb. 600, 262 N. W. 537.

There being no error in the instructions, and the evidence being sufficient to sustain the verdict of the jury, the duty is imposed upon this court to affirm the judgment.

AFFIRMED.

LEONARD HILTON, APPELLANT, V. GUY L. CLEMENTS, EXECUTOR, CROSS-APPELLEE: WILLIAM H. BERGER ET AL., APPELLEES.

291 N. W. 483

FILED MARCH 29, 1940. No. 30648.

1. **Fraudulent Transactions.** Transactions between a brother and sister, by which property is transferred by assignment by one who is unable to pay his just debts, should be carefully scrutinized. Such transactions are presumptively fraudulent, and the burden is upon him who asserts the good faith thereof to prove it.
2. ———. The question of fraudulent intent is a question of fact and not of law, when considered in the matter of an assignment charged to be made to hinder and delay creditors.
3. ———. Where the testimony relied upon to show good faith is given by interested relatives, the reasonableness or unreasonableness of their evidence bears considerable weight in arriving at a just conclusion.
4. **Creditors' Suit.** The beginning of a creditors' suit, issuing of process and serving thereof give a specific lien upon the property which it is sought to reach.
5. **Descent and Distribution.** An equitable lien may be impressed upon the unexempt portion of the distributive share of an heir, a judgment debtor, in a decedent's estate, which is in process of administration in the county court.
6. **Creditors' Suit.** The filing of a creditors' bill and service of process, creating a lien upon the equitable assets of a judgment debtor, does not necessarily require the issuance of a restraining order, or undertaking in support thereof, or an injunction.
7. **Judgment.** In a suit in equity, the relief to which the plaintiff is entitled under his petition and proofs may be granted pursuant to his general prayer, where the defendants understand the issues involved and the record discloses that they have full knowledge of the objectives sought by the plaintiff in his petition.

8. ———. "The general rule of equity pleading which is preserved by our Code is that, if there is a prayer for general relief, as well as for special relief, the court may extend the relief specially prayed for and give such other relief as the case warrants, consistent with the general frame and purpose of the petition." *Burnham v. Bennison*, 121 Neb. 291, 236 N. W. 745.
9. **Fraudulent Conveyances.** "Good faith consists in an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render all transactions unconscientious." *Wood v. Conrad*, 2 S. Dak. 334, 50 N. W. 95.

APPEAL from the district court for Cass county: WILMER W. WILSON, JUDGE. *Affirmed as modified.*

Harry Grimminger and *Lloyd E. Peterson*, for appellant.

H. G. Wellensiek and *W. A. Robertson, contra.*

Guy L. Clements, pro se.

Heard before SIMMONS, C. J., ROSE, EBERLY, CARTER, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

The plaintiff, a resident of Hall county, Nebraska, recovered a judgment in the district court against William H. Berger, on December 6, 1928, in the amount of $1,515.20, with interest and costs. The judgment was kept in force as a valid existing lien by issuance of execution and return thereon, without property found upon which to levy. The transcript of the judgment was filed in the district court for Cass county on November 28, 1934, and was a valid existing lien on July 19, 1935, when the plaintiff instituted the present action in the nature of a creditors' bill. In this court the plaintiff appears as appellant and cross-appellee; defendants William H. Berger and Flora Zachary as appellees and cross-appellants, and defendant Guy L. Clements as cross-appellee.

The purpose of this action is to set aside an assignment, to sell the property, goods, chattels, rights and credits of

William H. Berger, assignor, and apply the proceeds to the payment of plaintiff's judgment, to restrain and enjoin the executor of the estate of George L. Berger from distributing any property bequeathed to William H. Berger, and for such other and further relief as may be just and equitable. The assignment in question was made on April 26, 1935, by William H. Berger to his sister, Flora Zachary, assigning to her all of his right, title and interest in the cash, notes, mortgages and choses in action, and other property that would come to him out of the estate of his father, George L. Berger. At the time of the execution of the assignment, the estate of George L. Berger was pending in the county court of Cass county, and the property of said estate was in the hands of the executor thereof.

William H. Berger claimed that he was, and had been for many years, indebted to his sister, Flora Zachary. The indebtedness started with a small amount, and no record was kept thereof from and after 1920. Berger at the time of trial was 60 years of age. He had engaged in farming in and near Grand Island, suffered financial reverses and became seriously ill. He testified he was forced from his home. On October 1, 1929, he went to live with his sister in Omaha, Nebraska. She was engaged in keeping roomers and boarders and at times sold merchandise from door to door. He boarded and roomed in her home the greater part of the time. The reasonable value of the services rendered by her in this respect was fixed at $7 a week, and it is further claimed that the sister had advanced to him the sum of $8 a week for traveling and for medicine and doctor's bills for certain physical ailments suffered by him, of which he could not become permanently cured, and which rendered him unfit for work. He further testified that his sister had advanced to him an amount equal to $25 or $30 a week. The sister stated she had also loaned him $500 or $600, which she had received from her mother's estate. Berger was indebted to his father's estate in the amount of $2,690.19, which was deducted from his share thereof. The assignment recited the express consideration for nurs-

ing, care and support furnished by Flora Zachary to William H. Berger, and for services of a like nature in the future. There is nothing in the record to sustain the advancement of funds as claimed, except the statements made by Berger and Flora Zachary. There is no evidence of indebtedness between them, with the exception of a note in the sum of $1,500, in favor of Flora Zachary, dated December 20, 1930, due and payable December 20, 1931, for money advanced to her brother. At the time of the execution of this note William H. Berger agreed orally with Flora Zachary to pay her from any amount constituting the distributive share of his father's estate. This note remained unpaid. In addition to the foregoing evidence, there is testimony to the effect that Berger made the assignment in question for the purpose of defeating any claim that his wife might have for support, and the plaintiff understood that the assignment was made for such purpose, claiming that the executor informed him of the fact.

Where an assignment is made by an heir and beneficiary under a will of all his right, title and interest in and to all of his distributive share of an estate to his sister, in consideration of nursing, care and support, and in consideration of future services of a like character, the effect of the assignment is to put the property of the assignor beyond the reach of a judgment creditor, and the transaction will be closely scrutinized.

It is a rule of law that transactions between relatives, such as a brother and sister, by which property is transferred by assignment by one who is unable to pay his just debts, should be carefully scrutinized. Such transactions are presumptively fraudulent, and the burden is upon him who asserts the good faith thereof to prove it. See *Buckner v. McHugh*, 123 Neb. 396, 401, 243 N. W. 119, citing *Light v. Kennard*, 11 Neb. 129, 7 N. W. 539.

The question of fraudulent intent is a question of fact and not of law, when considered in the matter of an assignment charged to be made to hinder and delay creditors. When the testimony relied upon to show good faith is given

by interested relatives only, the reasonableness or unreasonableness of their evidence has considerable weight in arriving at a just conclusion. The testimony of the brother and sister in the instant case is void of corroboration. The trial court found, and the record warrants the finding, that the assignment in question was fraudulent and void as to the plaintiff, the judgment creditor, and that the assignor and the assignee participated in the fraud.

June 21, 1935, an affidavit in garnishment was filed by plaintiff and garnishee summons issued thereon, served personally on the executor June 22, 1935. Section 20-1026, Comp. St. 1929, provides that, pursuant to a garnishee summons, the garnishee shall appear and answer under oath all questions put to him, touching all property and credits of every description in his possession or under his control, and disclose the amount owing by him to the defendant, whether due or not. The executor claims that he appeared for the purpose of such examination but that no one was present to examine him. He did not file a written answer. Defendant Berger was in Plattsmouth on the day set for hearing claims against his father's estate, to assist the executor in checking the claims, when he heard that the garnishment had issued, and made this assignment. The executor dictated the assignment to a stenographer. He acted in a dual capacity as attorney for and executor of the estate.

On the same day the executor was to appear as directed by the garnishee summons, he filed a final report and petition for final settlement in the county court. He did not inform the county court of the plaintiff's suit, or the nature thereof, or that he was served with process as a party defendant, or that he was served with garnishee summons. Hearing was ordered on the petition for final settlement for August 16, 1935, notice published as required by law, final decree entered August 16, 1935, and the executor, in compliance with the assignment and in accordance with the decree on final settlement, paid over to the assignee, Flora Zachary, the distributive share of William H. Berger in the

estate of George L. Berger, deceased, and receipt thereof was filed in the county court. The executor was discharged October 18, 1935.

The trial court found that the executor did not participate in the fraudulent purpose of the defendants Berger and Zachary, but acted in good faith in closing the estate and making distribution of the assets thereof under the order of the county court. The plaintiff contends that the court erred in making the foregoing finding, for the reason that the executor of the estate of George L. Berger was duly served with summons, advised of the nature of plaintiff's action prior to closing the estate, and that the executor was not acting in good faith in the premises. The court decreed that a lien existed from and after July 23, 1935, on the distributive share of William H. Berger in the hands of the executor.

In 37 C. J. 308, it is said: "Generally speaking, an equitable lien is a right, not recognized at law. and which a court of equity recognizes and enforces as distinct from strictly legal rights, to have a fund or specific property, or the proceeds, applied in full or in part to the payment of a particular debt or demand; a right of a special nature over property which constitutes a charge or encumbrance so that the property itself may be proceeded against in an equitable action, and either sold or sequestered, and its proceeds * * * applied on the debt or demand of the person in whose favor the lien exists."

The plaintiff's petition in the instant case prayed that the property, goods, chattels, rights and credits due the defendant William H. Berger be ordered sold, as required by law, and the proceeds applied on the payment of the plaintiff's judgment.

Plaintiff cites 8 R. C. L. 33, sec. 38, which states, in substance: Where no specific lien has been acquired upon the property before suit, the filing of a creditor's bill in equity to reach personal assets of the debtor, or at least the service of process upon the suit, will operate as a specific lien in the nature of an attachment or equitable levy upon the

property sought to be charged. This principle of law receives support in this state as evidenced by the language contained in *Flint v. Chaloupka*, 72 Neb. 34, 99 N. W. 825, as follows: The beginning of a creditors' action gives a specific lien upon the property which it is *sought to reach*, and continues while the cause is pending.

In the case of *Plummer & Davis v. School District No. 1 of Marianna*, 90 Ark. 236, 118 S. W. 1011, we find this language (p. 240): "The lien obtained on the equitable assets of a debtor by a creditor's suit attaches thereto from the time of the service of process, or * * * on the filing of the bill and suing out of process."

The plaintiff further contends that the distributive share of a debtor in the hands of an administrator or an executor is reached by a creditors' bill. This court in the case of *Fremont Farmers Union Cooperative Ass'n v. Markussen*, 136 Neb. 567, 286 N. W. 784, held: "A creditors' suit may be maintained to impress a lien upon the distributive share of a judgment debtor in a decedent's estate, which is in process of administration in the county court, and to require the administrator or executor to account for it, after order of distribution by the county court, to the clerk of the district court."

The executor's defense is that he was obligated to close the estate, as required by law, and to follow the orders and directions of the county court, to avoid personal liability. The district court cannot, necessarily, make any order that will interfere with the process of administering the estate and making it ready for final distribution. It can, however, implant a lien on such unexempt portion thereof as may be coming to a particular heir and require the administrator to account for it after final order of the county court to the clerk of the district court, or a receiver appointed for that purpose, if the plaintiff so prays or requests, which the plaintiff in the instant case did not do. See *Fremont Farmers Union Cooperative Ass'n v. Markussen, supra.*

The executor for further defense states that no restraining order was issued or undertaking given as required in

the issuance of a restraining order, and that he was not enjoined from disposing of the assets constituting the distributive share of defendant William H. Berger in the estate of George L. Berger, deceased, and in his hands as executor thereof.

The court in *King v. Goodwin*, 130 Ill. 102, 22 N. E. 533, held: "The general rule is, that the filing of a creditor's bill, and service of process, create a lien on the equitable assets of the judgment debtor, without an order for an injunction or the appointment of a receiver. This lien cannot be impaired."

It would further appear from the executor's contention that his defense is to the effect that the prayer of plaintiff's petition is insufficient to impress an equitable lien upon the distributive share of William H. Berger, heir, in the hands of the executor, for the reason that the prayer does not contain language specifically to such effect.

This court, in *Kimmerly v. McMichael*, 83 Neb. 789, 120 N. W. 487, held: "In a suit in equity the relief to which plaintiff is entitled under his petition and proofs may be granted pursuant to his general prayer, where defendants understand the issue and resist his allegations by evidence." And in the body of the opinion, at page 793, the court, in quoting from *Wood v. Speck*, 78 Neb. 435, 110 N. W. 1001, said: " 'Generally, under the rule of equity pleading, if a litigant is not entitled to the relief specifically asked for, he may, nevertheless, recover under the general prayer whatever the proof shows he is entitled to, if consistent with the allegations of his pleading.' "

In the instant case, the evidence of the executor, of course, was taken after he had disposed of the distributive share of William H. Berger, as provided by the assignment by Berger to his sister, Flora Zachary, but such fact would not alter the rule announced in the above case, where it is apparent from the record that the executor understood the issues and had full knowledge of the objectives sought by the plaintiff in his petition. In furtherance of the foregoing rule, this court in *Burnham v. Bennison*, 121 Neb.

291, 236 N. W. 745, held: "The general rule of equity pleading which is preserved by our Code is that, if there is a prayer for general relief, as well as for special relief, the court may extend the relief specially prayed for and give such other relief as the case warrants, consistent with the general frame and purpose of the petition."

It has been held: "The failure to ask relief to which it is apparent the party is entitled will not, as a general rule, have the effect to deprive him of the relief to which he is entitled in fact; and especially is this so where the defendant has appeared and answered." 16 Encyclopedia, Pleading and Practice, p. 795, and cases cited. And in 5 Encyclopedia, Pleading and Practice, p. 568, it is said: "Under the general prayer for other and further relief, the creditor, as in other suits, is entitled to such relief as the law announces upon the facts pleaded and proved, whether especially asked for or not."

Without repeating the evidence but referring thereto, we believe the executor did not act in good faith. "Good faith consists in an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render all transactions unconscientious." *Wood v. Conrad,* 2 S. Dak. 334, 50 N. W. 95. With full knowledge of all of the facts and the purpose of plaintiff's action, as heretofore related, the executor proceeded to file his final order and close the estate, and pay the assignee the distributive share of William H. Berger, the assignor.

Under the circumstances of this case, the trial court did not err in creating an equitable lien on the distributive share of William H. Berger in the George L. Berger estate in favor of the plaintiff. In addition thereto, equity and good conscience require that the executor account to the district court for such distributive share of William H. Berger, and, upon failure to do so, judgment shall be rendered in favor of the plaintiff and against the executor personally for an amount equal to, but not in excess of, the distributive share

of William H. Berger in the estate of George L. Berger, deceased.

AFFIRMED AS MODIFIED.

NETTA WHITTAKER, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.
291 N. W. 275

FILED MARCH 29, 1940. No. 30773.

1. Trial. The giving of an instruction defining the terms "ordinary care" and "negligence" is not prejudicially erroneous when a proper instruction is given as to the care required of a common carrier, and where other instructions also properly place the burden of proof on the plaintiff.
2. Appeal. An instruction containing the word "unnecessary," in referring to a sudden, violent jerk or lurch of a street car, when such word is not contained in the plaintiff's petition, is not prejudicially erroneous, since a violent, sudden jerk of an unusual character, such as to warrant an inference of negligence in the operation or handling of the street car, would be an unnecessary jerk or jolt.
3. Trial. An instruction defining the duties of a passenger riding in a street car to use reasonable care for his own safety, to guard against ordinary and usual jerking or lurching of the car, is not prejudicially erroneous when the court also states that the plaintiff must go further and show that the jerking or lurching or movement of the car was of an unusual character.
4. ———. An instruction that a street car company is under no obligation to keep a car immovable until passengers have reached a seat in the car is not prejudicial where, in other instructions, the court has set forth the claims of the plaintiff and the burden of proof required of plaintiff.
5. ———. An instruction that there is no liability on the part of a street car company for ordinary jerks and lurches, incident to the starting and stopping of a car, is not prejudicially erroneous where such instruction also contains language that the plaintiff has the burden of proving that the jerking or lurching or movement of the car was of an unusual character, and where the evidence shows that plaintiff's complaint was of a sudden, unusual and violent jerking of the car in starting.
6. ———. Instructions, defining the duties of passengers riding in

and proceeding to a seat in a street car, to exercise reasonable care for their own safety, and to take advantage of supports to guard against ordinary jerks and lurches of the car, and that passengers assume all the risks that are ordinary and usual in the way of jerking or lurching in the ordinary and necessary operation of the car, are not prejudicially erroneous where the instructions further state that plaintiff must show that the jerking and lurching movement of the car of which she complains was of an unusual and forcible nature, and so forcible that a reasonable passenger, knowing that he must take reasonable care of himself against ordinary movements of cars, would not have reasonably anticipated; such instructions are not instructions on contributory negligence, but merely apprise the jury of the duties of a passenger riding in a street car.

7. ———. It is not error for the court in an instruction to assume as true facts that are established by the evidence without controversy.

8. ———. "Where the instructions as a whole clearly present to the jury the issues of fact and the law applicable thereto, harmless error in instructions separately criticized on appeal does not require a reversal of the judgment on the verdict." *Interstate Airlines, Inc., v. Arnold*, 127 Neb. 665, 256 N. W. 513.

9. Appeal. The verdict of a jury, based on conflicting testimony, will not be disturbed on appeal unless clearly wrong.

APPEAL from the district court for Douglas county: JOHN W. YEAGER, JUDGE. *Affirmed.*

Benjamin S. Baker, Fred A. Wright and *Edward Shafton*, for appellant.

Kennedy, Holland, De Lacy & Svoboda, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

This is an action for damages for personal injuries sustained by plaintiff on account of the alleged negligence of defendant in operating a street car. The jury returned a verdict for the defendant. Plaintiff appeals.

Plaintiff's petition and the allegations thereof to create liability as against defendant may be more fully discerned from the evidence. The defendant's answer denies that the

plaintiff received any injuries due to any negligence on the part of its motorman in the operation of its street car. The reply is, in effect, a general denial.

The record discloses that plaintiff, a woman 66 years of age at the time of the accident, took care of her husband's office during the past few years. To do so she was required to travel on street cars, going downtown and returning five or six times a week. She had traveled on street cars for 52 years. On November 7, 1937, at 5:30 in the afternoon, plaintiff, with her husband, intending to go to the Joslyn Memorial in Omaha, boarded a street car at Fifty-first and Leavenworth streets. She preceded her husband to the platform of the street car. As to what happened is reflected by her testimony as follows: "A. Well, when I started to step up into the car, of course I was thrown off my balance when it jerked the first time, and as I started to step into this car I reached for this rod, it pitched me so quick that I fell from the front of the street car to that little cross seat, fell down and struck my—struck the knees, tore the skin all off the knees and they were both bleeding and I don't know when I hit my ankle." She fell prostrate on the floor of the street car; her elbows and knees were injured and bleeding. The nature of the jerking as described by her was very severe and of a character she had never before experienced when on a street car. She was lifted to her feet by a young man and sat on a side or long seat of the car. The plaintiff and her husband left the street car at Twenty-ninth street and Leavenworth, had lunch at a café, remained there for an hour, then boarded a street car and proceeded to Fifty-seventh street and Leavenworth, to the home of Mrs. Elizabeth Weber, who attended plaintiff.

Plaintiff's husband testified in substance as follows: "Well, I was standing there, I had handed him (the motorman) my money, waiting for my car checks, when the car gave a lurch, a jerking, then all at once it gave a second jerk, when I had to grab the iron railing there to keep me from falling and then he started again and I looked and my

wife was in the car flat on the floor." He had for more than 50 years past had occasion to travel on street cars and for a great many years in the neighborhood where he had boarded this car, and the jerk or lurch, he testified, was the severest he had experienced during all of such time. In the front part of the car there is a side seat on either side, 10 or 12 feet long, then cross seats. The plaintiff "was lying flat on the floor, face down, with her head pretty well up to the cross seats." He immediately called the motorman's attention to what had occurred.

The motorman testified: The car runs east and west on Leavenworth. There are two tracks on Leavenworth, and the street runs east downhill. He is in a sitting position when he operates the car, and when plaintiff and her husband boarded the car he came to a complete stop at Fifty-first and Leavenworth, opened the door and then closed it. He further testified, in substance, that there was a small amount of air in the brake, having a tendency to hold and keep the car from jerking. He fed the air slowly, as was his custom in operating the car. After the car started to move, or started rolling, as he expressed it, he shut off the power. He denied that the car jerked, as testified by the plaintiff and her husband. He glanced around and saw a boy attending the plaintiff. At that time plaintiff and this boy were seated on a long seat in the car. He did not see the plaintiff fall to the floor; nor did he remember any statement made by the plaintiff's husband to him, but admitted that he might have made some statement. After the plaintiff had fallen and when the young man was assisting her, plaintiff's husband was standing by the motorman; then proceeded to the plaintiff's side. The motorman took no names of witnesses, made no report of the accident, and contends that there was no jerking within a distance of 100 feet after he started the car. At the time of the accident, the motorman had been in the employ of the defendant company for a period of two weeks. He testified that he had been trained by other operators for a period of 10 days, several hours at a time, before assuming his duties. He

did not remember whether he started the car before or at the time plaintiff's husband paid the fare. He learned the next day that a claim had been made against the defendant and then reported the accident.

From the foregoing facts it is apparent that plaintiff's contention is that the motorman operating the street car, while proceeding east on Leavenworth street, started the car, then violently and suddenly stopped the car, throwing the plaintiff off-balance, and, before she could regain her balance, the motorman, with great violence, suddenly started the car forward.

The plaintiff first assigns as error the giving of instruction No. 6. This instruction defines negligence and ordinary care. The contention is that the instruction is inapplicable to common carriers for hire. The degree of care to be exercised by the operator of a street car is expressed in *Daly v. Publix Cars,* 128 Neb. 403, 259 N. W. 163, which held: "Common carriers of passengers 'are required to exercise the utmost skill, diligence and foresight consistent with the business in which they are engaged for the safety of the passengers, and they are liable for the slightest negligence.' *Griffen v. Lincoln Traction Co.,* 118 Neb. 459."

The preceding instructions to instruction No. 6 given by the court define the issues, the burden of proof and the definition of "preponderance of the evidence." Instruction No. 7 properly defines the degree of care to be exercised by the operator of a street car for the safety of passengers riding therein, and meets the rule as announced in *Daly v. Publix Cars, supra.* Plaintiff's petition uses the term "negligence," and instruction No. 6 merely defines the term. Such instruction, if erroneous, is without prejudice. See *Hardung v. Sheldon,* 133 Neb. 427, 275 N. W. 586.

Plaintiff next complains of instruction No. 10 given by the court as follows: "You are instructed that the plaintiff brings this action alleging that her fall was caused by a sudden, violent and unnecessary jerk or lurch of the car. Now, you are instructed that it is not sufficient for the plaintiff to show merely that she was injured by a jerking

or lurching of the car. She must go further and show that the jerking or lurching was of such an unusual character as to warrant an inference of negligent handling of the car." The contention is that the plaintiff did not allege in her petition that it was an unnecessary jerk or lurch; that the defendant may be liable whether the jerk or lurch was unnecessary or not. The language used by the court is "that her fall was caused by a sudden, violent and unnecessary jerk or lurch." In this class of cases the plaintiff has the burden of proving by a preponderance of the evidence the following: In an action by a passenger for damages against a street railway company, it is not sufficient for plaintiff to show merely that she was injured by jerking or lurching of the car; she must go further and show that the jerking or lurching was of such an unusual character as to warrant an inference of negligent handling of the car, or that it was attributable to some act of negligence. *McCann v. Omaha & C. B. Street R. Co.*, 117 Neb. 786, 222 N. W. 633.

In 13 C. J. S. 1410, sec. 750, the rule is concisely stated as follows: "A carrier is not liable for jerks or jolts which are necessarily incident to the use of the conveyance, but the rule is otherwise where the jerk or jolt is unnecessary, or sudden and violent." By the use of the word "unnecessary" in the instruction complained of, the court did not err. Any violent and sudden jerk of such an unusual character as to warrant an inference of negligence in the operation or handling of the street car, under the rule as announced in *McCann v. Omaha & C. B. Street R. Co., supra,* would be an unnecessary jerk or jolt.

Plaintiff next complains of the giving of instruction No. 11 as follows:

"You are instructed that it is a matter of common knowledge that street cars operated upon rails make some movement when they start, and for the ordinary jerks or lurches usually and ordinarily incident to the starting and stopping of a street car, there is no liability upon the part of the company and even though the plaintiff fell as the result

of the ordinary and usual jerking or lurching incident to starting or stopping a car, there would be no liability upon the part of the defendant.

"The plaintiff must go further and show that the jerking or lurching or movement of the car was of an unusual character."

Plaintiff's contention is: After the motorman started the car forward, he then reversed its movement and then moved it forward again; in all, constituting three movements in the operation of the car, all included as a part of the starting of the car; therefore, the manner of stopping the car is beside the point, and the instruction tends to mislead the jury, for the reason that the jury could well apply the instruction to the negligent stopping in the starting of the car; that is, the instruction is broad enough to include negligent stopping in the process of starting the car, and that by such instruction the plaintiff must anticipate such a stop; must anticipate that the car would jerk or lurch and prepare herself against such jerking and lurching.

The plaintiff's evidence, as we view it, attempts to show that the street car jerked in starting; that when the motorman attempted to start the car there were two jerks. The instruction complained of is not misleading or prejudicial when considered with all of the instructions given.

Plaintiff next contends that the court erred in giving instruction No. 12 as follows: "You are instructed that a street railway company is under no obligation to keep a car immovable until passengers have reached a seat within the car." The record discloses that the plaintiff entered the car, passed the motorman, and was proceeding into the main part of the car, evidently to seat herself, when the jerks of which she complains occurred, and before she reached her seat she fell, as testified. In previous instructions the court set forth the claims of the plaintiff and required her to prove by a preponderance of the evidence that the jerking or lurching of the car, resulting in her fall and injuries, was of such an unusual character as to warrant an inference of negligent handling of the car, or that it was

attributable to some act of negligence. See *McCann v. Omaha & C. B. Street R. Co., supra*; also 13 C. J. S. 1382, sec. 733. Instruction No. 12 is proper when considered with all of the instructions in the case.

The plaintiff next complains of instructions 13 and 14. Instruction No. 13 reads: "You are instructed that passengers on trolley cars, in exercising reasonable care for their own safety, must take advantage of supports to guard against ordinary jars or lurches, since passengers are charged with knowledge that the operation of a trolley car not infrequently occasions ordinary jars and lurches." Instruction No. 14 reads: "It is the duty of passengers on street cars on entering and progressing towards a seat to take reasonable care of themselves not to fall by reason of motions of the car that are necessarily made in the operation of the street cars. And should a passenger be injured, even by the motions of the car that are made reasonable and necessary in the operation of such cars on the streets, then there is no responsibility by the street car company in damages to the one injured, no matter how severe the injury may be, as a passenger assumes all the risks that are ordinary and usual in the way of jerking or lurching in the ordinary and necessary operation of the car. The plaintiff must go further and show that the jerking and lurching movement of the car of which she complains was of an unusual and forcible nature, and so forcible that a reasonable passenger knowing that he must take reasonable care of himself against ordinary movements of cars would not have reasonably anticipated."

The error complained of in the giving of instructions 13 and 14 is that the defendant's answer does not contain an allegation of contributory negligence on the part of the plaintiff, and that the instructions here given place a duty on the plaintiff; that instruction No. 13 indirectly admits that plaintiff did not exercise reasonable care for her safety, and that instruction No. 14 assumes negligence on the part of the plaintiff.

The court did not submit the issue of contributory negli-

gence to the jury; such issue was not pleaded by defendant. The instructions heretofore recited disclose the ordinary risks that are assumed by passengers riding in street cars. The crux of the plaintiff's case is not the result of an ordinary jerk or one that is incident to the mode of travel, but a sudden, violent jerk of an unusual character, such as to warrant an inference of negligence in the handling or operation of the car. *McCann v. Omaha & C. B. Street R. Co., supra.* We believe that the instructions are self-explanatory. It is proper for the trial court to give instructions to apprise the jury of the duties of a passenger riding in a street car. Such instructions do not tell the jury that the passenger violated any duty; nor do the instructions tell the jury they should ascertain whether or not the passenger violated any duty for her own safety under the circumstances.

The plaintiff complains of the giving of instruction No. 15, to the effect that plaintiff suffered from a physical ailment, leakage of the heart, many years before the accident in question, and that she had been under the observation and treatment of a physician for such ailment; that the evidence now shows that she has leakage of the heart, and that the heart is at this time compensated; that under the evidence "you could not find that the heart disease in question, i. e. mitral regurgitation or leakage of the heart was caused by the accident, but only that it may have been aggravated." The evidence establishes the foregoing facts, and the instruction is not erroneous.

Instruction No. 16 is also complained of which told the jury that plaintiff sustained only temporary injuries to her ankle and knee, and that no claim is made for permanent disability thereto. The evidence fully sustains this statement, and the instruction is free from error.

In *Gibson v. Glens Falls Ins. Co.*, 111 Neb. 827, 197 N. W. 950, this court held: "It is not error for the court in an instruction to assume as true facts that are established by the evidence without controversy." See, also, *Major v. Harrison*, 132 Neb. 363, 272 N. W. 201.

Plaintiff next complains of the refusal of the trial court to give offered instruction No. 7 and of the giving of instruction No. 18, both on the measure of damages. We have carefully read the offered instruction and that given by the court on this proposition. The objection to instruction 18 is to the following paragraph: "But you will not allow anything by way of doctor's bills, medical expense or loss of time from her usual occupation as a housewife, since any claim for these items has vested in her husband." While this language may not have been necessary in the instruction, it nevertheless is a proper statement and is not prejudicial.

"Where the instructions as a whole clearly present to the jury the issues of fact and the law applicable thereto, harmless error in instructions separately criticized on appeal does not require a reversal of the judgment on the verdict." *Interstate Airlines, Inc., v. Arnold*, 127 Neb. 665, 256 N. W. 513.

Plaintiff next contends that the verdict is not sustained by sufficient evidence, is contrary thereto and not sustained by law. The plaintiff's objection seems to be that the testimony of plaintiff and her husband should overbalance the testimony of the motorman, who denied their testimony. There are two versions of what occurred and the manner in which it happened, constituting a direct conflict in the testimony.

"In an action at law for damages, a controverted issue of fact is a question for the jury, and, when they pass on evidence which is substantially conflicting, their finding in that respect will not be set aside on appeal unless clearly wrong." *Mensinger v. Ainsworth Light & Power Co.*, 94 Neb. 465, 143 N. W. 475. See *Hahn v. Doyle*, 136 Neb. 469, 286 N. W. 389; *Dworak v. Shire*, 126 Neb. 474, 253 N. W. 655; *Prince v. Pathfinder Life Ins. Co.*, 133 Neb. 705, 276 N. W. 661.

For the reasons given, the judgment of the district court is

AFFIRMED.

JOHNSEN, J., not participating.

STATE OF NEBRASKA, PLAINTIFF, V. JAKE DEGELE, DEFENDANT.

291 N. W. 554

FILED APRIL 2, 1940. No. 30952.

Contempt. Contumacious refusal of witness to answer a legal and proper interrogatory, propounded to him in a hearing before a referee of this court, punished by imprisonment in the county jail for ten days.

Original action for contempt by the state, on the relation of the attorney general, against Jake Degele. *Defendant held guilty of contempt.*

Walter R. Johnson, Attorney General, and *Rush C. Clarke,* for plaintiff.

Homer L. Kyle, for defendant.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

PAINE, J.

This is an original action commenced in this court by the attorney general filing an information charging the defendant with contempt of court in refusing to answer a question which he was ordered to answer by a referee conducting a hearing for this court.

The information charged, in brief, that on January 12, 1940, the defendant was guilty of contempt, in that on or about said day, at a hearing held in Lancaster county, Nebraska, in case No. 30791, pending in this court, wherein the State of Nebraska, ex rel. Nebraska State Bar Association, was relator, and I. C. Bachelor was respondent, before the Honorable Leon L. Hines, the duly appointed, qualified and acting referee in said cause, heretofore appointed by this court, the defendant, Jake Degele, was called as a witness on behalf of the relator, and duly sworn by the said Honorable Leon L. Hines, as referee, and, having been so sworn, the defendant, Jake Degele, did then and there wilfully, unlawfully, feloniously and contemptuously refuse to answer

a legal and proper question propounded to him by the attorney general, which question was this: "Mr. Degele, at any time before the fire did you tell Mr. Bachelor that you were going to burn one of the houses on your farm?"

Defendant Degele was at said time an inmate of the state penitentiary, in which he was serving a sentence for arson.

One of the several answers made by Mr. Degele was this: "A. I don't know what you men got me in here for. I am serving time in the penitentiary for my crime, and why am I here? The Referee: You are here to testify, Mr. Degele, to the questions that the attorney general puts to you, and you will please answer them. If there is any objection on the grounds of incriminating yourself, why, you, of course, have the right to raise that objection; but in that question there is no such possibility, so you may answer the question. * * * Mr. Bachelor: I think he ought to have somebody here to represent him. A. Well, I am just going to refuse to answer any more questions. You can do with me as you darn please. I am serving time in the penitentiary, and I don't belong here, out there is where I belong, and I am just absolutely through. * * * Mr. Clarke: Well now, I think this witness has been thoroughly and fully and carefully advised about his duty here, and I frankly don't propose to undertake to examine him all afternoon with him asking the court to advise him. So at this time I ask the court to enter an order adjudging this witness guilty of contempt and punishing him in such manner as the referee sees fit."

The record shows generally that, after some further attempts by the referee, the referee squarely asked the witness whether he was refusing to answer any more questions, to which the witness replied: "Until I am a free man. You can put this case off until I am a free man."

It appears from the record that this proceeding is not an attempt to compel the witness to answer the questions set out, since the hearing in the Bachelor case has been completed. The attorney general insists that the defendant be

punished for his contumacious refusal to answer questions properly put to him in the hearing before the referee.

Our law applicable to this situation reads as follows: "Every court of record shall have power to punish by fine and imprisonment, or by either, as for criminal contempt, persons guilty of any of the following acts: First. Disorderly, contemptuous, or insolent behavior towards the court, or any of its officers in its presence; * * * Fourth. Any wilful attempt to obstruct the proceedings, or hinder the due administration of justice in any suit, proceedings, or process pending before the courts; Fifth. * * * the refusal to answer any legal and proper interrogatory." Comp. St. 1929, sec. 20-2121.

When defendant was first brought before this court on March 25, 1940, and pleaded not guilty, bail was fixed at $500, which he could not raise, and he was given 20 days in which to file answer. Thereafter, on March 30, 1940, he appeared before the court with his counsel, Homer L. Kyle, and thereupon Mr. Kyle requested that the defendant be allowed to withdraw his former plea of not guilty, and the defendant thereupon entered a plea of guilty. Thereupon, full statements were made by Rush C. Clarke, assistant attorney general, and Homer L. Kyle, and the court took the matter under advisement.

Courts are charged with the duty and necessity of guarding their proceedings against everything which interferes with due and orderly administration of justice (*McCauley v. State*, 124 Neb. 102, 245 N. W. 269), and a contempt committed before a duly appointed referee of this court cannot be overlooked, but must be punished, to enforce the orderly administration of justice.

"It has been held that court commissioners and referees may punish as for contempt disobedience of their orders, but it is more generally held that in the absence of express authority such officers have no such power." 17 C. J. S. 66, sec. 53.

This court has held, under section 64-107, Comp. St. 1929, that a notary public had the right to issue an order of com-

mitment finding a witness in contempt for refusing to answer a proper question, and directing that he be confined in the county jail of Douglas county. *Ehlers v. State*, 133 Neb. 241, 274 N. W. 570; *Id.*, 302 U. S. 655, 58 S. Ct. 364.

The record shows that the defendant has realized his error, for, after going over the matter at length with his attorney, he now enters a plea of guilty.

In consideration of all the facts and circumstances in this case, this court is of the opinion that a sentence of ten days, to be served in the jail of Lancaster county, will meet the ends of justice; said sentence to begin March 26, 1940, being the day upon which the defendant's attorney notified the clerk of this court of the defendant's desire to plead guilty.

SENTENCE TEN DAYS.

GUS P. HORN, TRUSTEE, APPELLEE, V. RALPH GOLDBERG, APPELLANT.

291 N. W. 493

FILED APRIL 5, 1940. No. 30788.

1. **Bankruptcy.** "Whether a creditor had reasonable cause to believe his debtor insolvent * * * is a question of fact. In determining this question, it is not necessary to find that the creditor actually knew or believed that the debtor was insolvent. He is chargeable with notice of such facts as a reasonable inquiry, in view of the circumstances with respect to the debtor's condition which were brought home to him, might fairly be expected to disclose." *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624, 94 N. W. 822.
2. **Trial.** Where an instruction correctly states the law in language commonly used and generally understood, it is not necessary that the trial court, on its own motion, define the language used. A party desiring a definition of the terms so used should offer such an instruction. In the absence of a specific request, the failure of the trial court to define the terms used in the requested instruction is not error.
3. **Appeal.** Assignments of error have been examined and prejudicial error not found.

APPEAL from the district court for Douglas county: WILLIAM A. DAY, JUDGE. *Affirmed.*

Ziegler, Dunn & Becker and *D. L. Manoli,* for appellant.

Young & Williams, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

SIMMONS, C. J.

This is an action to recover alleged preferential payments made to the defendant by a bankrupt corporation.

Plaintiff alleges: (1) That he is the trustee of the estate of Famous Liqueurs, Inc., Bankrupt (hereinafter called the company); (2) that the company was a Nebraska corporation engaged in the wholesale liquor business; (3) that, on and prior to January 13, 1937, defendant was a general unsecured creditor of the company in the sum of $2,000; (4) that voluntary payments of $500 and $1,500 were made by the company to the defendant on January 20, 1937, and February 16, 1937, respectively; (5) that the company was insolvent at the time of said payments, that said payments gave to the defendant a greater percentage of his claim than other general creditors will receive, that the payments were made from company assets and the estate of the company thereby diminished; (6) that at all of said times, defendant knew, or had a reasonable cause to believe, that a preference would be effected by said payments and that the company was insolvent; (7) that the company filed a voluntary petition in bankruptcy on March 11, 1937, and on said date was adjudged bankrupt, and that its estate has not sufficient assets to pay its liabilities.

Plaintiff prayed that said payments be adjudged to be avoidable preferences, that they be avoided, and that he have judgment for $2,000 and interest. Defendant by answer admitted allegations (1) and (2) and denied all other allegations of plaintiff's petition. Trial was to a jury. At the close of plaintiff's case in chief, and also when both parties rested, defendant moved for an instructed verdict

for the following reasons: "1. Under the law and the evidence the plaintiff is not entitled to recover. 2. The evidence fails to show that the defendant, on the date of the payments charged as a preference, was informed and is chargeable with any information, and the evidence fails to show that he knew that there was any insolvency on the part of" the company, "or that he believed, or had reason to believe, that the payments made * * * would constitute a preference in his favor." The motions were overruled. Verdict and judgment was for the plaintiff. Defendant appeals.

Defendant contends that the court erred in overruling said motions, basing his contention upon the propositions that the burden rests upon the plaintiff to prove (1) that the bankrupt was insolvent at the time of the payments; (2) that the defendant must have known, or have reasonable cause to believe, that the payment would effect a preference. U. S. C. A. Title 11, sec. 96.

On the first proposition, the defendant states that the law requires that a payment, before it can be avoided as illegal, must effect a preference, and that there is no evidence to show that a preference actually resulted from the payment to the defendant. Defendant by his answer put this matter in issue. Plaintiff concedes that, to be voidable, a payment must actually have effected a preference. Schedules of the assets and liabilities were introduced. These schedules were admissible as tending to prove the insolvency charged. *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 633, 99 N. W. 675. Defendant contends that there is no proof as to what claims or amount thereof were allowed, and that, as the record stands, it is a conjecture as to whether or not a preference has been effected. There are two answers to defendant's contention. First, defendant repeatedly objected to placing the books and records of the company in evidence on the ground that it encumbered the record. Counsel for defendant at one time stated: "I think the totals of the indebtedness and the assets as shown by the books, if they do show, computed by * * * somebody * * * competent is

all that ought to be offered and go into the record." Plaintiff then proved the report of the auditor's examination of the books and records.

It is obvious from the record that the case was tried on the theory that the controverted issue was whether or not the defendant "knew or had a reasonable cause to believe that a preference would be effected by" the payments to him. That was the proposition directly presented in the motion for an instructed verdict. The defendant in several places in his brief in this court recognizes that to be the "issue." The defendant may not now be allowed to present this case on a different basis than that on which it was presented to the trial court. That the company is insolvent cannot be denied. As shown by the company's books as of December 31, 1936, the company's total assets were $8,413.68, its liabilities were approximately $16,000, it operated in 1936 at a net loss of $6,178.62, the company operated at a loss after January 1, 1937. That it was insolvent at all times after January 1, 1937, is the only conclusion that can be deducted from this record. The plaintiff has on hand a net amount of $2,052.45 plus an uncollected judgment for $665.85. One creditor has an unsecured claim for over $3,400. Defendant's account was paid in full. It is obvious that a preference has been effected.

On the second proposition in support of his position that his motion should have been sustained, defendant contends that the plaintiff's evidence establishes a "mere suspicion" and not a "reasonable cause to believe."

"Whether a creditor had reasonable cause to believe his debtor insolvent * * * is a question of fact. In determining this question, it is not necessary to find that the creditor actually knew or believed that the debtor was insolvent. He is chargeable with notice of such facts as a reasonable inquiry, in view of the circumstances with respect to the debtor's condition which were brought home to him, might fairly be expected to disclose. * * * But a mere knowledge that the debtor has other liabilities, or of circumstances which could operate no further than to create a suspicion

of possible insolvency, is not always sufficient." *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624.

In *Walter v. National Fire Ins. Co.*, 101 Neb. 639, 164 N. W. 569, this court cited with approval the following:

"It is not necessary that the creditor knows or even actually believes that a preference is being given, provided he has reasonable cause to be put upon inquiry as to whether a preference is actually given or not. Constructive notice is sufficient, upon the ground that, when a party is about to perform an act by which he has reason to believe that the rights of a third party may be affected, an inquiry as to the facts is a moral duty and diligence and an act of justice. Whatever fairly puts a party upon inquiry is sufficient notice where the means of knowledge are at hand, and, if the party under such circumstances omits to inquire and proceeds to receive the transfer or conveyance, he does so at his peril, as he is chargeable of knowledge and of all the facts, which by a proper inquiry he might have ascertained." 1 Loveland, Bankruptcy (4th ed.) sec. 508.

What then are the facts "brought home" to the defendant which a "reasonable inquiry" would have disclosed? A representative of another creditor testified that, on January 13, 1937, he attempted to collect his account without success; that thereafter on that day he told the defendant of his efforts to collect his account; that his company was very much worried; that the president of the company would not give him definite figures of its business and refused to allow the creditor to examine its books; that it was the opinion of the creditor that the company was going "deeper and deeper in the hole;" that the company's president had given him figures indicating that the company was "several thousand dollars in the red and couldn't meet their accounts;" that that creditor believed the company should be liquidated. He further testified that the defendant replied, "Even if you do lose something on it, or a good part of it, you won't miss very much of it," and that the defendant did not think the company was making any progress, and "I don't think you will be able to get" it;

that the creditor might lose a good part of its claim. Through personal friendship and business transactions, the defendant had an intimate relationship with the company's president; at defendant's suggestion, defendant and the company employed the same auditor; defendant's bookkeeper set up the company's books. The defendant testified that he knew nothing about the company in January and February, 1937, except that it seemed to be doing a much larger business than formerly. He denied largely the plaintiff's testimony as to the conversation of January 13, 1937. The dispute of fact was a question for the jury. They believed the plaintiff's witnesses. It is obvious that defendant was not ignorant of many details of the company's business and of its financial situation and methods of doing business.

The facts which an inquiry would have disclosed have been set out herein. Each case must necessarily depend upon its own circumstances. Under the facts here, there is ample evidence to be submitted to a jury and to sustain the finding that the defendant "had reasonable cause to believe" that the payment to him "would effect a preference." The trial court did not err in overruling the motions for a directed verdict.

Defendant next contends that the court erred in giving the following instruction:

"You are instructed that for the purpose of the cause now on trial all of the relevant and material allegations of the plaintiff's petition have been established by a preponderance of the evidence *as a matter of law*, except the allegation contained in paragraph No. 6, which is as follows: 'At all of said times defendant Goldberg knew or had reasonable cause to believe that a preference would be effected by said payments, and each of them, and that said corporation was insolvent.'"

Defendant objects specifically to that part of the instruction holding that all material allegations (except the one noted) have been established *as a matter of law*. Defendant contends that there is no *conclusive* proof of those facts,

and that therefore the instruction was erroneous. By the provisions of section 20-853, Comp. St. 1929, errors not affecting the substantial rights of the defendant must be disregarded. As we have pointed out, the only issue on which the defendant offered evidence was the issue to which the court directed the jury's attention. We need not determine the question of whether or not those facts were established "as a matter of law." They were sufficiently established to take the case to the jury, and no evidence to the contrary was offered. We do not see that the defendant has been prejudiced. The trial court properly directed the jury's attention to the one issue which the parties recognized as in controversy.

Defendant next contends that the trial court erred in admitting evidence that the company sold liquor at cost to a corporation owned by the defendant and that rebates were given by the company to the defendant's corporation for the reason that it is "wholly irrelevant *to the issue* in the case at bar." Defendant on his examination in chief testified that he received "advantageous prices" from the company and that "they were never selling me at a loss." Plaintiff then offered evidence that the company sold the defendant's corporation at net cost, without margin for overhead, delivery or profit, and that the company had paid rebates to the defendant. The defendant opened the question in his case in chief, the evidence showed the manner of business between the defendant and the company, and went to the defendant's credibility. The admission of the evidence under the circumstances was not prejudicial error.

The trial court instructed the jury in part as follows: "Therefore, before the plaintiff can recover against the defendant, he must establish, by a preponderance of the evidence, that the defendant Ralph Goldberg knew or had reasonable cause to believe that Famous Liqueurs, Inc. was insolvent as of the date of January 20, 1937, and February 16, 1937, respectively, and that the payments made to him would result in a preference."

Defendant contends that the court erred in failing to de-

fine "reasonable cause" as used in this instruction. The defendant further states: "The defendant, seeking to avoid the dangers of a general instruction" tendered four proposed instructions which were refused. An examination of the tendered instructions reveals that they sometimes use but do not define the term "reasonable cause to believe."

This court has held: "Though an instruction may not be so specific as it should be, if it is not misleading, it is not cause for reversal, where the complaining party made no request for a more specific instruction." *Webb v. Omaha & S. I. R. Co.*, 101 Neb. 596, 164 N. W. 564. "A party desiring a more explicit instruction than that given should offer such an instruction." *Larsen v. Savidge*, 103 Neb. 79, 170 N. W. 353. The instruction given being a correct statement of the law, in the absence of a request for a more specific definition of the term used, the failure of the trial court to define the term "reasonable cause to believe" was not error. *Hannah v. American Live Stock Ins. Co.*, 111 Neb. 660, 197 N. W. 404; *Bonacci v. Cerra*, 134 Neb. 476, 279 N. W. 173.

The judgment of the trial court is

AFFIRMED.

FEDERAL FARM MORTGAGE CORPORATION, APPELLEE, V. FRANK B. HUGHES ET AL., APPELLANTS.
291 N. W. 475

FILED APRIL 5, 1940. No. 30768.

1. **Evidence.** "This court will not take judicial notice of the rules of practice of the district court." *Dunn v. Bozarth*, 59 Neb. 244, 80 N. W. 811.
2. **Appeal.** "The rules of practice in a district court, alleged to have a material bearing on the rulings complained of, before they can enter into a determination of a question presented in this court, must be incorporated in the bill of exceptions." *Jones v. Cleary*, 2 Neb. (Unof.) 541, 89 N. W. 386.
3. ———. "In the absence of a bill of exceptions containing the evidence, an order made by the district court confirming sale of real estate is presumed to be correct, and supported by sufficient evidence." *Keeler v. Manwarren*, 61 Neb. 663, 85 N. W. 839.

APPEAL from the district court for Cuming county: ADOLPH E. WENKE, JUDGE. *Affirmed.*

A. R. Oleson, for appellants.

Moodie & Burke, William W. Graham, Philip N. Johnston, Philip M. Wellman and *Franklin L. Pierce, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

EBERLY, J.

We copy the following from appellants' brief as the accepted statement of the issues determined, as claimed by them, viz.:

"This is an appeal from an order of confirmation in the sale of land under an attachment proceeding and the judgment rendered therein. * * *

"(b) *The Issues Actually Tried in the Court Below*

"That the price bid for this land, being $1,644.85, for 320 acres of highly improved land in Cuming county, was so inadequate to its value that in conscience and fair dealing the sale should not be confirmed.

"Also that the (district) court could not hear this matter at the time it did, because under its rules, which provide, 'Cases in which issues are joined subsequently to the second day of the term shall be for trial at any adjourned or special term, or session of the court, upon service of a trial notice of at least ten days, but this shall not apply to cases triable by jury, unless a jury may be in attendance at such time.'

"That the regular terms of court in Cuming county for 1939, are April 3d and October 2d. * * * The appellants herein submitted their objections upon the record in the case. This record shows that the appraisers under the levy of the order of attachment, with the sheriff, fixed the value of 320 acres of land at $24,000.00. * * *

"The (district) court overruled the objections of these appellants and ordered the sale confirmed and deed issued to the purchaser."

The errors now presented are, that, (1) the (district) court erred in proceeding with hearing this matter over the objections of appellants under rule XV of the district court; (2) that the (district) court erred in overruling the objections of these appellants and in confirming this sale upon the record in this case.

The "record," as referred to, consists of, viz.: Order of Attachment, Return on Order of Attachment (by sheriff), Order of Sale on Attachment, Return to Order of Sale on Attachment, Objections to Confirmation, Order of Confirmation, Notice of Appeal.

It appears that no bill of exceptions has been settled in this proceeding, and the final judgment entered in the main action does not appear as part of the transcript. It is plain that the first objection presented by appellants may not be sustained. There is no bill of exceptions, and rule XV of the rules of the district court for Cuming county is not before us for consideration.

"The rules of practice in a district court, alleged to have a material bearing on the rulings complained of, before they can enter into a determination of a question presented in this court, must be incorporated in the bill of exceptions." *Jones v. Cleary,* 2 Neb. (Unof.) 541, 89 N. W. 386. See, also, *State v. Scott,* 59 Neb. 499, 81 N. W. 305.

"This court will not take judicial notice of the rules of practice of the district court." *Dunn v. Bozarth,* 59 Neb. 244, 80 N. W. 811.

Nor are we impressed with the challenge to the sale as made by the sheriff. Fraud is not claimed, and a presumption of regularity and validity attaches to the judgments of courts, which must be overcome by affirmative proof. In the present case, the district court properly had before it all proceedings in the case, including the final judgment entered therein, and was advised of the recitals contained in the written instruments in suit which had been introduced in evidence on the trial had of the merits. True, as part of the sheriff's return in this case, there is an appraisement wherein the "following described property" is appraised at

the sum of $24,000. This appraisement is made pursuant to section 20-1008, Comp. St. 1929, wherein the officer levying an attachment is required to secure the making of "a true inventory and appraisement of all the property attached." But this appraisement is neither limited to the net value of the interest of the attachment debtors nor is such interest therein required to be separately appraised.

Attached property shall be sold under the same restrictions and regulations as if the same had been levied on by execution. Comp. St. 1929, sec. 20-1033; *Helmer v. Rehm,* 14 Neb. 219, 15 N. W. 344.

It follows that the validity of a sheriff's sale in the instant case must be based upon the actual or net value of the defendants' interest in the lands sold. *McKeighan v. Hopkins,* 14 Neb. 361, 367, 15 N. W. 711; *Hibbard v. Weil & Kahn,* 5 Neb. 41. The appraisement upon which appellants rely does not establish this fact.

On the other hand, the amount received by the sheriff at the attachment sale is competent evidence of value. *Douglass v. Hill,* 29 Kan. 527.

The controlling rule is: "There are no restrictions upon the means by which the trial court may satisfy itself that a fair price was obtained at a foreclosure sale or that a subsequent sale would not realize a greater amount. The burden is upon the appellants to show affirmatively that the judgment of the trial court is erroneous." *Occidental Bldg. & Loan Ass'n v. Beal,* 122 Neb. 40, 239 N. W. 202. See, also, *Crews v. Alberts,* 124 Neb. 671, 247 N. W. 602; *Lindberg v. Tolle,* 121 Neb. 25, 235 N. W. 670.

Neither can the objection to this sale, based upon the fact that the attached lands were sold *en masse,* in the absence of further evidence properly preserved in a bill of exceptions duly allowed, showing appellants were prejudiced thereby, secure them any relief. The rules long adopted in this jurisdiction as applied to foreclosure sales, and equally applicable here, are:

"It is within the province of the district court in a decree of foreclosure to provide for the appraisement and sale of

the premises in parcels or *en masse*, as the best interests of the parties may require.

"Where a decree of foreclosure contains no direction to the officer charged with its execution touching the appraisement and sale of the mortgaged property, he is vested with a discretion in regard to the matter which will not be disturbed, in the absence of a showing of prejudice to the party complaining.

"Nothing appearing to the contrary, it will be presumed that an officer charged with the execution of a decree was regardful of the rights of the parties to the action, and in a lawful manner performed the duties imposed upon him." *Kane v. Jonasen*, 55 Neb. 757, 76 N. W. 441. See, also, *Clark v. Birge*, 100 Neb. 769, 161 N. W. 427.

As hereinbefore suggested, these rules are equally applicable to attachment sales of real estate.

Indeed, the general rule controlling the class of cases here under consideration is: "In the absence of a bill of exceptions containing the evidence, an order made by the district court confirming sale of real estate is presumed to be correct, and supported by sufficient evidence." *Keeler v. Manwarren*, 61 Neb. 663, 85 N. W. 839. See, also, *State v. Knapp*, 8 Neb. 436, 1 N. W. 128; *Doon v. Adcock*, 127 Neb. 335, 255 N. W. 548.

It follows that the decree of confirmation entered herein by the trial court is correct, and it is

AFFIRMED.

STATE, EX REL. GLENN GOSSETT, APPELLANT, V. JOSEPH O'GRADY, APPELLEE.

291 N. W. 497

FILED APRIL 5, 1940. No. 30819.

1. **Indictment and Information.** All criminal informations in this state shall be verified by the oath of the county attorney, complainant, or *some other person*.
2. ———. All words descriptive of the capacity or character of

the affiant contained in the verification of a criminal information may be entirely disregarded, and if otherwise complete such verification will still be sufficient.

3. ———. Under the statute, a proper verification of a criminal information by "some other person" is sufficient and renders additional verification by the prosecuting attorney unnecessary.
4. **Habeas Corpus.** A judgment or sentence of a court of record in a criminal case is supported by the usual presumptions of validity and regularity when attacked collaterally. To obtain release from a sentence of imprisonment by habeas corpus, such sentence must be absolutely void.
5. ———. "Habeas corpus is a collateral, and not a direct, proceeding, when regarded as a means of attack upon a judgment sentencing a defendant." *Hulbert v. Fenton*, 115 Neb. 818, 215 N. W. 104.
6. **Indictment and Information.** It is a general rule that, where an objection is not made at the time prescribed by law, the objection is waived.
7. ———. The failure of the county attorney, in person, to present and file a criminal information, and indorse or sign his name thereto, if omissions, are to be corrected by a motion to quash presented by defendant, and his failure to present such motion within the time prescribed by statute constitutes a waiver of all objections based thereon.
8. **Criminal Law.** "A plea of guilty waives any defect not jurisdictional, and which may be taken advantage of by motion to quash or by plea in abatement." 16 C. J. 403.
9. **Query:** Under the facts and circumstances set forth in this record, is not the "acting county attorney" herein to be considered as a deputy, appointed by a person having lawful authority to appoint, and a *de facto* officer whose official acts, so far as they affect the public or third persons, are valid?

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Olaf W. Osnes, for appellant.

Walter R. Johnson, Attorney General, and *George W. Ayres, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

EBERLY, J.

Glenn Gossett appeals from a final order entered in the

district court for Lancaster county, in a habeas corpus proceeding instituted by him therein, which order determined that he was "not unlawfully imprisoned or deprived of his liberty by respondent," Joseph O'Grady; denied his application for release; dismissed his petition; and discharged the writ of habeas corpus theretofore issued on his application therefor.

The record discloses that William P. Mullen was a practicing attorney at law in Hall county, Nebraska, in June and July, 1936. Lloyd Kelly was at that time the county attorney of Hall county, and, being about to be absent from the state, he asked William P. Mullen to take care of the duties of the county attorney's office. Mr. Mullen agreed to do so. On June 27, 1936, and while Mr. Kelly was absent from the state, occasion arose to file an information against Glenn Gossett, who is now the relator and appellant in this action, charging him with grand larceny, alleged to have been committed in Hall county. Mr. Mullen prepared, verified and filed such an information, and signed his own name to it as acting county attorney. On June 27, 1936, Glenn Gossett pleaded guilty to the charges contained in the information before Honorable E. G. Kroger, a judge of the district court for Hall county, Nebraska, and was sentenced to serve a term of five years in the Nebraska state penitentiary. He was thereupon conveyed to the place of confinement pursuant to such sentence, and was thereafter imprisoned therein pursuant thereto. On August 1, 1939, he instituted the proceeding herein, and the final order thereafter entered denying relief, he now challenges by this appeal. His claim for relief is based upon the proposition that William P. Mullen had no legal right to sign, make, verify and file the information against him, and the information thus signed and filed by William P. Mullen was void, and the action of the trial court thereon was also void as being without jurisdiction.

The information, omitting the caption, is as follows: "Be It Remembered, That Wm. P. Mullen, Acting County Attorney in and for Hall County, and in the Eleventh Ju-

dicial District of the State of Nebraska, who prosecutes in the name and by the authority of the State of Nebraska, comes here in person into Court at this the April Term, A. D. 1936, thereof, and for the State of Nebraska gives the Court to understand and be informed that Glenn Gossett, late of the County aforesaid, did, on or about the 23rd day of June, A. D. 1936, in the County of Hall and the State of Nebraska aforesaid, then and there being, then and there unlawfully and feloniously did steal, take and carry away Fifty Dollars ($50.00)," etc.

This information is sworn to and verified by Wm. P. Mullen, as the acting county attorney.

The proceedings of the district court, and the sentence imposed upon this information, are, in substance, as follows: "Whereas; At a regular term of the District Court for said county, which term was begun and held at the courthouse, in Grand Island, Nebraska, in said county, on the 13th day of April, 1936; Present, the Hon. E. G. Kroger, one of the judges of said court; And, Whereas, Wm. P. Mullen, Acting County Attorney in and for the County of Hall, State of Nebraska, on the 27th day of June, 1936, came into Court, and presented a certain information in due form of law, against Glenn Gossett for Grand Larceny, which information was by order of the Court filed and the cause docketed; and afterwards on the 27th day of June, 1936, further proceedings were had upon said information, to-wit: On Plea of Guilty, The said defendant Glenn Gossett was duly arraigned and entered his plea of guilty to the charge contained in the information. * * * And, Whereas, On the 3d day of July, 1936, the said Glenn Gossett was duly arraigned before the Court for sentence, and was then by the said Judge sentenced, in these words: 'It is the sentence of the Court that the defendant be confined in the State Penitentiary at Lancaster, in Lancaster County, Nebraska, at hard labor, Sundays and Holidays excepted, for a period of five years. Solitary confinement to be no part of this sentence."

Originally section 8 of article I of the Constitution of 1866

required prosecutions for felonies, with certain exceptions, to be "on the presentment or indictment of a grand jury." In our Constitution of 1875 this provision was modified in part by adding thereto a proviso in the following terms: "Provided, That the Legislature may by law, provide for holding persons to answer for criminal offenses on information of a public prosecutor; and may, by law, abolish, limit, change, amend or otherwise regulate the grand jury system." Neb. Const. 1875, art. I, sec. 10.

By chapter 108 of the session laws of 1885, approved March 9, 1885, there was duly enacted "An act to provide for prosecuting offenses on information and to dispense with the calling of grand juries except by order of the district judges."

The following constitutes excerpts of this legislation, as now carried in our Compiled Statutes of 1929, viz.:

Section 29-1601, Comp. St. 1929, provides: "The several courts of this state shall possess and may exercise the same power and jurisdiction to hear, try and determine prosecutions upon information, for crimes, misdemeanors, and offenses, to issue writs and process, and do all other acts therein, as they possess and may exercise in cases of the like prosecutions upon indictments."

By section 29-1602, it is provided, in part: "All informations shall be filed in the court having jurisdiction of the offense specified therein, by the prosecuting attorney of the proper county as informant; he shall subscribe his name thereto," etc.

Section 29-1603 provides in part: "All informations shall be verified by the oath of the county attorney, complainant, or some other person, and the offenses charged therein shall be stated with the same fullness and precision in matters of substance as is required in indictments in like cases."

In section 29-1604 we find the following: "The provisions of the criminal code in relation to indictments, and all other provisions of law, applying to prosecutions upon indictments to writs and process therein, and the issuing and service thereof, to motions, pleadings, trials and punish-

ments or the execution of any sentence, and to all other proceedings in cases of indictments, whether in the court of original or appellate jurisdiction, shall in the same manner and to the same extent, as near as may be, apply to informations, and all prosecutions and proceedings thereon."

Embraced within the provisions thus made applicable to prosecutions by informations by such section 29-1604 are the following:

Section 29-1806: "The accused may except to an indictment by: First. A motion to quash; Second. A plea in abatement; Third. A demurrer."

Section 29-1807: "A motion to quash may be made in all cases, when there is a defect apparent upon the face of the record, including defects in the form of the indictment or in the manner in which an offense is charged."

Section 29-1811: "The accused shall be taken to have waived all defects which may be excepted to by a motion to quash, or a plea in abatement, by demurring to an indictment or pleading in bar or the general issue."

As to the verification of the information now before us, it may be said that a similar statutory provision existed in Washington, which provided that such a verification may be made by the "prosecuting attorney, complainant, or some other person." It was held that in the verification of an information "all the words descriptive of the capacity or character of the affiant may be entirely disregarded, and the verification will still be sufficient." *Hammond v. State,* 3 Wash. 171, 28 Pac. 334.

Washington, Kansas and Missouri have statutory provisions relative to the verification of criminal informations similar to the provision here under consideration. The following cases hold that a verification by "some other person" is sufficient and renders additional verification by the prosecuting official unnecessary. *State v. Brooks,* 33 Kan. 708, 1 Pac. 591; *State v. Clark,* 158 Mo. App. 489, 138 S. W. 894; *State v. Davidson,* 44 Mo. App. 513. *Bailey v. State,* 36 Neb. 808, 55 N. W. 241, affords an instance where this court sustained an information so verified.

It is obvious, therefore, as disclosed by the record presented, that as to a proper statement of the offense charged and the verification thereof, the information attacked complies with the statutory requirements. The force and effect of the requirements that "all informations shall be filed * * * by the prosecuting attorney of the proper county as informant; he shall subscribe his name thereto," under the facts in this case, are all that still remain for our consideration.

It will be remembered that "Habeas corpus is a collateral, and not a direct, proceeding, when regarded as a means of attack upon a judgment sentencing a defendant." *Hulbert v. Fenton*, 115 Neb. 818, 215 N. W. 104. See, also, *Alexander v. O'Grady, ante*, p. 645, 290 N. W. 718.

A judgment or sentence of a court of record in a criminal case is thus supported by the usual presumptions of validity and regularity when thus attacked. To obtain release from a sentence of imprisonment by habeas corpus, such sentence must be absolutely void. *Hulbert v. Fenton, supra*; *Michaelson v. Beemer*, 72 Neb. 761, 101 N. W. 1007; *In re Carbino*, 117 Neb. 107, 219 N. W. 846.

The failure of the county attorney, in person, to present to and file the information in the proper court, and the failure of the county attorney, in person, to indorse or sign his name thereto were obviously known to the relator, and were at all times disclosed by the public records, of which he was bound to take notice. Under the statutes quoted, if these omissions complained of constituted errors, a definite time was provided for their correction by a motion to quash. A failure of the relator to avail himself of that remedy prior to his plea to the merits, by force of statute, constituted a waiver thereof.

The general rule is that, where an objection is not made at the time prescribed by law, the objection is waived. 12 Standard Ency. of Procedure, 665. This jurisdiction is fully committed to this rule. *Johnson v. State*, 53 Neb. 103, 73 N. W. 463; *Davis v. State*, 31 Neb. 247, 47 N. W. 854; *Richards v. State*, 22 Neb. 145, 34 N. W. 346;

Emery v. State, 78 Neb. 547, 111 N. W. 374; *Guignon v. State*, 101 Neb. 587, 163 N. W. 858; *Tasich v. State*, 111 Neb. 465, 196 N. W. 688.

It is also a well-established principle of criminal procedure that "A plea of guilty waives any defect not jurisdictional, and which may be taken advantage of by motion to quash or by plea in abatement." 16 C. J. 403.

Indeed, in *Trimble v. State*, 61 Neb. 604, 85 N. W. 844, this court expressly approved the principle which controls in the instant case. In that case defendants Trimble and Wilson were being tried on the charge of robbery from the person. They had been arraigned and a plea of not guilty entered in their behalf. On the day of trial, without withdrawal of their plea, defendants filed a motion to quash the information, based on the grounds, viz.: (1) That the information was not filed by, or verified by the oath of, the prosecuting attorney; (2) that the information was not sworn to before a magistrate or other judicial officer authorized by law to administer oaths. The trial court struck the motion from the files and refused to accord it any consideration whatever. This action of the district court this court sustained, for the reason that these objections, if ever existing, had been waived by the defendants under the statutes, now sections 29-1811 and 29-1604, Comp. St. 1929. It will be noted that the first clause of the motion to quash in the *Trimble* case sets forth a contention similar to that here presented, and which was held waived by failure to file a motion to quash within the time prescribed, which is the exact situation presented in the instant record.

But even if properly raised by timely objection, the validity of the information is by no means foreclosed. It is not questioned but that this information in terms properly charges the crime. It is properly sworn to.

The admitted facts include the following, viz.: Lloyd Kelly, the duly elected and qualified county attorney, was absent from the state of Nebraska from June 23 to July 4, 1936. Before leaving he requested William P. Mullen to take care of the duties of the county attorney's office, and

Mullen expressly assented to such request. Attorney Mullen thereupon, after this authorization, without taking an oath or giving bond, prepared, signed, swore to and filed this information as acting county attorney in the district court for Hall county on June 27, 1936. The district court thereupon caused the record to be made as hereinbefore set forth. The word "acting" in this connection has been employed to designate a *locum tenens* who is performing the duties of an office to which he does not himself claim title.

The supreme court of Iowa in *State Bank of Williams v. Gish*, 167 Ia. 526, 149 N. W. 600, in discussing the term "acting officer," employed the following language:

"The phrase 'acting officer' is used to designate, not an appointed incumbent, but merely a *locum tenens*, who is performing the duties of an office to which he himself does not claim title. 1 Am. & Eng. Ency. of Law (2d ed.) 577; 1 Cyc. 632. Both these authorities cite the same case, *Fraser v. United States*, 16 Ct. Cl. 514.

"There is no evidence in the record as to how long this acting superintendent had been so acting, whether he was a deputy acting in the place of the superintendent, whether the superintendent had resigned, or whether he was dead or away on a vacation. All we have is the bare return."

In this *Gish* case, service of process upon an acting superintendent of an insane hospital was held good although no provision of statute authorized such designation.

Section 26-904, Comp. St. 1929, provides in part: "The county attorney may appoint one or more deputies who shall act without any compensation from the county, to assist him in the discharge of his duties." So far as advised, there is no requirement that such appointment be in writing. It is obvious, however, that the designation "acting county attorney" is not inconsistent with an appointment of one as the substitute of the county attorney and empowered to act for him in his name or in his behalf. The words employed must be taken in the light of the duties to be performed, and the acts required to make such performance legal and valid. This was certainly in the contempla-

tion of the parties to the transaction, and, under the facts involved, necessarily required the creation of a deputy county attorney. True, Mullen did not qualify by taking the oath and giving bond as such. But, would these omissions invalidate his official acts when collaterally attacked?

The relator relies upon *Langford v. State,* 114 Neb. 207, 206 N. W. 756, and *Lower v. State,* 106 Neb. 666, 184 N. W. 174, to sustain an affirmative answer to this question. Neither of these cases involved a collateral attack upon a judicial determination; both were direct attacks by appropriate proceedings in error. In the *Langford* case no information was filed by any one. In the *Lower* case the information was timely attacked by motion to quash, so that the doctrine of waiver here controlling was in no manner involved or determined in either of the decisions so relied upon by the relator.

In *Haskell v. Dutton,* 65 Neb. 274, 91 N. W. 395, this court sustained the validity of summons issued by J. E. Evans as deputy clerk of the district court, under the following facts: "When the present action was instituted, Evans was in the office of the clerk of the district court, claiming the right to act as deputy. He had acted in that capacity continuously for a year or more. He held an appointment from the duly constituted clerk and was discharging the duties of the office with his consent and under his direction. The appointment, however, was not in writing, and there had been, on Evans' part, a total failure to comply with the provisions of the statute (Compiled Statutes, 1901, ch. 10), relative to official bonds and oaths. Upon these facts, the district court rightly ruled that it had jurisdiction of the defendants and authority to pronounce judgment against them. Evans, according to the narrowest definition of the term, was a *de facto* officer, and his acts, so far as they affected the parties to the suit, were just as binding and efficacious as they would have been if all the conditions necessary to make him a *de jure* officer had been fulfilled. *Ex parte Johnson,* 15 Neb. 512; *Hamlin v. Kassafer,* 15 Or. 456; *Norton v. Shelby County,* 118 U. S. 425;

Fulton v. Town of Andrea, 73 N. W. Rep. (Minn.) 256; *Wheeler v. Sterrett,* 62 N. W. Rep. (Ia.) 675; *Carleton v. People,* 10 Mich. 249, 259."

We also take the following from the opinion in *Gragg v. State,* 112 Neb. 732, 201 N. W. 338, viz.: "Besides the foregoing averments, defendant charges that Mr. Gibbs, who verified and filed the information, was not the duly qualified, elected or appointed county attorney of McPherson county, and that 'his pretended acts as such assumed official were and are without authority of law and of no force or effect.' But the record shows that his appointment was regular. He did not, however, take the official oath nor file a bond. But he held himself out as county attorney and performed the duties pertaining to this office and was recognized by the public as county attorney, so that he was county attorney *de facto. Baker v. State, ante,* p. 654."

Now, the journal entry heretofore quoted discloses that Mr. Mullen held himself out as the duly authorized "acting county attorney" and was recognized as such by the district court for Hall county, and the information prepared, signed and filed by him was, by the order of that court, accepted and ordered entered of record as such. While he took no official oath and gave no official bond, these omissions, under the authority above cited, it would seem, could not be challenged collaterally, as is attempted in the instant case.

The following language of Morrissey, C. J., in *Holland v. State,* 100 Neb. 444, 160 N. W. 893 (an error proceeding to the district court for Furnas county), is applicable and controlling, it would seem, in the case here presented, viz.:

"It is urged that the information is absolutely void, because not signed by the county attorney in person, and we are cited to *Cubbison v. Beemer,* 81 Neb. 824, which follows an earlier case, holding that an information filed out of the term time is void. Section 5599, Rev. St. 1913 (Comp. St. 1929, sec. 26-904) authorizes the county attorney to appoint deputies who may assist him in the discharge of his duties. There is nothing in this record to show that Lambe was appointed such deputy, but when his right to sign the

information is questioned for the first time after arraignment and plea, and while a plea of not guilty is still pending, his appointment, qualification and right to act in the absence of a showing to the contrary, will be presumed."

It must also be admitted that a plea of guilty as charged is equally as effective as a waiver as is a plea of not guilty.

The conclusion of the entire matter in the instant case is: That the regularity of the proceedings leading up to a sentence in a criminal case cannot be inquired into in a proceeding for a writ of habeas corpus; that, if the court had jurisdiction of the defendant and authority to try the charge against him, its action can be assailed only in a direct proceeding; that none of the errors upon which the relator relies in this proceeding affect the jurisdiction of the trial court (when collaterally considered) and they have been effectually waived by the petitioner.

It follows, therefore, that the action of the district court in its denial of relief to petitioner is correct, and is

AFFIRMED.

ARTHUR BALIS V. STATE OF NEBRASKA.
291 N. W. 477

FILED APRIL 5, 1940. No. 30763.

1. **Forgery.** A variance between an instrument described in the information in a criminal case and the evidence given in support thereof is not fatal unless it is material to the merits of the case or prejudicial to the rights of the accused.
2. **Criminal Law.** Where evidence is produced tending to show a common plan by several persons to commit a crime, the statements of each looking toward the carrying out of the plan are competent against the others.
3. ———. Where a county attorney, on the cross-examination of the accused charged with forgery, asked him: "And in 1926 when you forged checks up in Bellevue, Nebraska, I went up and straightened them up for you, with Charlie Matson?," the subject-matter of the question being in no way connected with the crime charged, it constitutes prejudicial error.
4. ———. "It is highly improper for the prosecuting attorney in a criminal case to declare to the jury his personal belief in

defendant's guilt, unless such belief is given as a deduction from the evidence." *Olsen v. State*, 113 Neb. 69, 201 N. W. 969.

5. ———. If the improper conduct of a prosecuting attorney is so flagrant and of such a character that neither rebuke nor instructions to the jury to disregard it can remove its sinister influence, a mistrial should be declared.

ERROR to the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Reversed.*

I. D. Beynon, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Don Kelley, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

CARTER, J.

Plaintiff in error was convicted in the district court for Lancaster county of the crime of forgery, and sentenced to serve eight years in the penitentiary.

The record shows that plaintiff in error, a practicing lawyer in Lincoln, Nebraska, became acquainted with and performed legal services for three inmates of the penitentiary, Ray O'Neil, Monroe Seiner and Blanchard Beemer. Shortly after his release from the penitentiary, Beemer broke into the branch office of E. W. Biggs & Co., at Fremont, Nebraska, and stole three books of blank drafts. It also appears from the testimony of plaintiff in error that O'Neil and one King called on him and informed him that they were going into the hide and fur business in a big way and that they were looking around for a place to live. Plaintiff in error sold them a house that he owned, taking $129.60 from the sale of some hides and furs, which they had with them, as a first instalment on the purchase price. O'Neil also was indebted to plaintiff in error in the amount of $440.05 for legal services.

On December 6, 1937, plaintiff in error received a letter from O'Neil inclosing a draft for $870.76, from which he

was instructed to deduct the $440.05 which O'Neil owed him, and to retain the balance until O'Neil called for it. Later in the day O'Neil and King called to make settlement on the house, and delivered to him three more drafts which were involved in this case. All four drafts proved to be forgeries. After the house deal was completed, O'Neil demanded the balance due him on the draft he had mailed to plaintiff in error, the amount being $430.71. Plaintiff in error refused to turn over the cash until the draft had been paid by the bank upon which it was drawn. Of the other three drafts, the first was left at the collection window of the Continental National Bank of Lincoln for collection, with instructions to advise him when they received the returns. The other two drafts were deposited in the First National Bank of Lincoln by plaintiff in error, with the understanding that no withdrawals would be made until the bank had made collection. All of said drafts were returned unpaid as forgeries. Plaintiff in error then picked up the four drafts and handed them over to the police department.

There is evidence in the record that Beemer took part of the stolen drafts to plaintiff in error. There is also evidence that plaintiff in error visited Seiner at the penitentiary on several occasions, including December 6, 1937, the date which the forged drafts bear and the date they were deposited with the Lincoln banks. Beemer was called as a witness for the state and testified that he delivered the stolen drafts to plaintiff in error and that he was to have one-third of the proceeds obtained from the forgery of the drafts. There is evidence that Beemer agreed to and did obtain the blank drafts and a valid draft executed by E. W. Biggs & Co., at Fremont, and turned them over to plaintiff in error for transmission to Seiner for the purpose of having the drafts forged. Other evidence is in the record which connects the plaintiff in error with the forging and uttering of the drafts in question. Without relating all the details of the evidence, we are convinced the evidence is ample to take the case to the jury.

Plaintiff in error contends that there was a fatal variance

between the drafts described in several counts of the information and the ones offered in evidence to prove the allegations of the respective counts. Some of the drafts offered in evidence contained the following statement which was not contained in the drafts described in the information: "Payable only for merchandise as printed on reverse side of this sheet." On the back of the drafts offered in evidence there was listed the number of hides and furs purchased, with the weight, price per pound and the total purchase price, none of which was copied in the various counts of the information. The following also appears on the drafts offered in evidence and not on those described in the various counts of the information: "The payee accepts this draft in payment of the invoice on the reverse side of this sheet, and guarantees the count, weight and delivery of the merchandise listed."

It is the general rule in criminal prosecutions where written instruments enter into the gist of the offense that they should be set out literally correct, and the omission of any part of the instrument in the indictment constitutes a variance. *Haslip v. State,* 10 Neb. 590, 7 N. W. 331; *Sutton v. State,* 58 Neb. 567, 79 N. W. 154. But a variance between an instrument alleged in the information and the evidence offered in proof thereof is not fatal unless it is material to the merits of the case or such as may be prejudicial to the defendant. Comp. St. 1929, secs. 29-1501 to 29-1503. *Goldsberry v. State,* 66 Neb. 312, 92 N. W. 906; *Flannigan v. State,* 127 Neb. 640, 256 N. W. 321. The variance in the instant case was not material, and consequently not prejudicial. As was said in *Burlingim v. State,* 61 Neb. 276, 85 N. W. 76, it was the intention of the legislature in adopting the Criminal Code to provide a rational system of procedure for the trial of accused persons and the punishment of crime. It was clearly the intent of the legislature to abolish supertechnical rules requiring literal exactness between the information and the proof. The variances complained of in the instant case do not constitute a material element of the offense charged. Neither do they mislead the accused nor

in any manner prejudice his rights. Such variances between the information and the proof received in evidence are not fatal. The receipt of the drafts in evidence in the present case, though at variance with the information in the respects noted, does not constitute reversible error.

Plaintiff in error complains of the ruling of the trial court admitting in evidence certain letters written by Seiner to Beemer. The letters make reference to transactions involving a person referred to as "Paw" or "Pappy." The evidence of Beemer is to the effect that plaintiff in error was the person referred to as "Paw" or "Pappy" in these letters. It is evident from an examination of the letters that they were written to further the perpetration of the crime of forgery. Seiner was an inmate of the penitentiary and Beemer had been only recently released. Getting the blank drafts and samples into the penitentiary, in order that Seiner could do the forging, became a major problem. There is competent evidence that the plaintiff in error conveyed the drafts to and from Seiner. The letters in question substantiate this evidence and tend to show the whole transaction which culminated in the forging and uttering of the drafts. We think the applicable rule is that, where evidence is produced tending to show a common plan by several persons to commit a crime, the statements of each looking toward the carrying out of the plan are competent against the others. *Smith v. State,* 111 Neb. 432, 196 N. W. 633; *Fields v. State,* 107 Neb. 91, 185 N. W. 400.

Plaintiff in error contends that there was misconduct on the part of the trial judge in that he appeared in the hall of the courthouse during a recess with a number of the forged drafts in his hands, at a time when the jury were present. The warrants were in evidence and had undoubtedly already been examined by the jury. We fail to see where any prejudice could possibly be inferred from this circumstance. The implications attempted to be drawn from this incident do not appear from the record to be in any way justified.

Plaintiff in error complains of the following question asked him by the county attorney: "And in 1926 when you

forged checks up in Bellevue, Nebraska, I went up and straightened them up for you, with Charlie Matson?" Proper objection was made and sustained. A mistrial was requested and the request overruled. It is true that the trial court attempted by instruction to the jury to remove the prejudice produced by the question. Questions of a county attorney, stating that the accused had committed or had been charged with other crimes, are wholly improper and constitute misconduct on the part of the prosecutor. In the instant case it was followed up by the county attorney in his closing argument when he referred to the wife of plaintiff in error in the following language: "But I will tell you what happened. She left him because she was tired of putting up with these kind of situations." Such remarks are so inflammatory and prejudicial to the rights of the accused that the efficient effort of the trial court to overcome it by instructions to the jury to disregard it is without avail. As was said in *Leo v. State*, 63 Neb. 723, 89 N. W. 303: "The poisoned shaft had sped its way, and it is difficult to conceive how the jury could thereafter have been oblivious of or ignored the fact that the accused was a suspicious character, and under police surveillance, because believed to be engaged in the perpetration of 'other jobs,' or, in other words, in the commission of different crimes."

In *Elliott v. State*, 34 Neb. 48, 51 N. W. 315, the prosecutor asked the defendant if it was not true that he stole a horse in Burnett county, Texas, and that the sheriff of that county had a warrant for his arrest. In reversing the case the court said: "Such cross-examination is highly improper and cannot fail to be prejudicial. A prosecuting officer, in his zeal to enforce the law must not forget that he also occupies a semi-judicial position, and that his duty requires him to resort to no questionable or improper means to secure a conviction."

The transgression in the instant case was so flagrant that the attempt of the trial court to destroy its influence by instructing the jury to ignore it cannot cure the error. A mistrial should have been declared.

Plaintiff in error complains of the following extract from the closing argument of the county attorney: "He told you to watch and see whether I told you I thought that Balis was guilty. Do you remember that? I wrote everything down as fast as he said it. Now he said you wait and see. Gentlemen of the jury, I think Balis is guilty. I don't hesitate to come out and answer that. And I can make it a lot stronger than I think he is guilty. I have investigated this case from 'A to Z.' I have checked it carefully the same as any other cases and I have never yet—(interrupted).

"Why, gentlemen of the jury, he stood here for an hour and sought to paint a halo of sanctity about the head of this defendant. You heard the testimony. He said to you, 'Why, the defendant at this moment is in an hour of domestic tragedy by reason of his wife.' He didn't say what about his wife. So far as you know she might be in a hospital on her death-bed,—she might have had her leg cut off. But I will tell you what happened. She left him because she was tired of putting up with these kind of situations. Since he asked for it,—I didn't want to bring it out, but he asked for it. * * * And I tell you honestly and I answer Beynon that in my own heart and in my own mind I believe the defendant guilty." Proper objections were made to these statements and a mistrial requested.

"It is highly improper for the prosecuting attorney in a criminal case to declare to the jury his personal belief in defendant's guilt, unless such belief is given as a deduction from the evidence." *Olsen v. State,* 113 Neb. 69, 201 N. W. 969.

The prosecuting attorney told the jury that he had investigated this case from "A to Z" and "that in my own heart and in my own mind I believe the defendant guilty." These statements contain a logical inference that the county attorney's personal belief of the guilt of the accused may not have been based wholly on the evidence before the jury, but that it is based upon other evidence ferreted out which is not before the jury. This is, of course, highly prejudicial to the rights of the accused. The statement in the oral ar-

gument that the wife of the accused left him because she was tired of putting up with situations of this kind is not supported by any evidence. The only purpose to be accomplished by commenting upon the domestic relations of the accused and his wife was to inflame and prejudice the jury against plaintiff in error. Such statements have no place in the argument of a criminal case to a jury, and tend to deprive the accused of the fair and impartial trial to which he is entitled.

The following quotation expresses our views: "The prosecuting attorney should be permitted to argue the testimony, but has no right to state what he personally thinks or believes of defendant's guilt, except as shown by proof. If he has first-hand knowledge of facts which legitimately tend to show defendant's guilt, it is his duty to present them under oath from the witness-stand the same as any other witness. If his knowledge is only that based upon the testimony, he should confine himself to his duty as a prosecuting official." *People v. Hill*, 258 Mich. 79, 241 N. W. 873.

In our judgment, the expressions of the county attorney of his belief of the guilt of the accused, as shown by the record, are such as to require a reversal of the case.

A person accused of crime is clothed with a presumption of innocence until he is proved guilty by competent evidence beyond a reasonable doubt. Evidence of former charges of previous crimes, in no way connected with the offense for which the accused is being tried, are not admissible against him. Rules of evidence and conduct are prescribed to insure that the rights of the accused are maintained. It is the duty of a prosecuting attorney to conduct the trial in such a manner as will be fair and impartial to the rights of the accused, no matter how guilty. One accused of crime is entitled to a fair and impartial trial, uninfluenced by prejudice, passion or public clamor. *Cooper v. State*, 120 Neb. 598, 234 N. W. 406. We are not able, of course, to evaluate the amount of influence, if any, that the improper argument of the prosecuting attorney had upon the jury, but it was well calculated to draw their attention

from the real issues. The refusal of the trial court to grant a new trial on this ground alone was prejudicial error.

The state argues that the improper and prejudicial statements complained of were invited. The argument of defense counsel made to the jury does not appear in the record. There is nothing in the record therefore to substantiate this contention.

For the reason herein set forth, the judgment and sentence of the district court is reversed and the cause remanded for a new trial.

REVERSED.

IN RE ESTATE OF RILEY S. HART.
LOUISA C. HART, APPELLANT, V. HARRY S. WHITE, EXECUTOR, APPELLEE.
291 N. W. 502

FILED APRIL 5, 1940. No. 30780.

1. Wills. In construing a will, courts are required to carry into effect the true intent of the testator as determined from the whole instrument.
2. ———. Where there are two provisions in a will relating to the disposition of the same property, the relative positions of the provisions in the will are not important where the intention of the testator can be ascertained by construing the provisions together.
3. ———. Where it can reasonably be done, a court will harmonize ambiguous expressions with the plain provisions of the will to effectuate the testator's intent.
4. ———. Where the intent of the testator with reference to specific property is plain in one part of a will, a court will not, in another part of the will relating to the same property, create an ambiguity by construction. The two parts of the instrument will be construed together in determining the true intent of the testator.

APPEAL from the district court for Burt county: JOHN W. YEAGER, JUDGE. *Affirmed.*

James A. Brown and *William O. Brown*, for appellant.

Chatt & Ellenberger, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

CARTER, J.

This is a suit brought by Louisa C. Hart, the widow of the testator, Riley S. Hart, to obtain a construction of the will of the said Riley S. Hart. The contest is between the executor of the estate and the widow of the deceased.

The difficulty arises out of the provisions of the sixth and seventh paragraphs of the will, the pertinent parts of which are as follows:

"Sixth:—All the rest, residue and remainder of my property, real, personal and mixed, I give to my said Executor hereinafter named to be held, by him in trust and to be disposed of in the following manner, to-wit:

"(1) My said Executor shall first pay all taxes thereon and keep the real estate in a good state of cultivation and the improvements thereon in as good a state of repair as the same may be at the time of my death, and shall then turn all the remaining income from said real estate, and all interest upon my personal estate to my said wife, Louie Hart, during the period of her natural life, I further direct my Executor not to lease any of the real estate of which I may die seized and possessed for a longer period of time than three years at any one time."

"Seventh:—Subject to the life estate hereinbefore given my said wife, I give, devise, and bequeath the following described real estate, to-wit: Northwest Quarter of Section 12, Township 23, North, Range 8, and also 17 acres of land in said Township and Range, lying and being along the west side of the Northwest Quarter of Section 12, and adjoining it, and being a part of the Northeast Quarter of Section 11, in said Township and Range, and being 177 acres, more or less, of land in Burt County, Nebraska, to Milton Metcalf, son of my deceased niece, Etta Metcalf, to be his absolute property, subject only to said Life Estate."

The only question to be decided is whether the widow

has a legal life estate in the real estate described in the seventh paragraph of the will, or whether said real estate is a part of the trust estate conveyed to the executor in the sixth paragraph of the will.

In the construction of a will conveying real estate, or an interest therein, courts are required to carry into effect the true intent of the testator as determined from the whole instrument. *In re Estate of Zimmermann,* 122 Neb. 812, 241 N. W. 553; *Krause v. Krause,* 113 Neb. 22, 201 N. W. 670. This court has plainly said that the intention of the testator as gleaned from the four corners of the will, unvexed by legal technicalities, will govern. *Albin v. Parmele,* 70 Neb. 740, 98 N. W. 29; *Seybert v. Seybert,* 118 Neb. 246, 224 N. W. 1. Where there are two provisions in a will relating to the disposition of the same property, the relative position of the provisions in the will is not important where the intention of the testator can be ascertained by construing the provisions together. *Grant v. Hover,* 103 Neb. 730, 174 N. W. 317. In construing a will, the court will presume that a testator intended the will to be a consistent whole and, if it can reasonably be done, the court will harmonize ambiguous expressions with the plain provisions of the will to effectuate the testator's intent. *In re Estate of Buerstetta,* 83 Neb. 287, 119 N. W. 469; *Marsh v. Marsh,* 92 Neb. 189, 137 N. W. 1122. It is by the application of these rules of construction to the whole will that we arrive at the true intent of the testator.

It will be noted that the sixth paragraph of the will gives all the residue of the estate to the executor to be actively managed by him, the net income from the residue, both real and personal, to be paid over to the widow during the period of her natural life. The seventh paragraph opens with the phrase "subject to the life estate hereinbefore given my said wife," clearly indicating that the testator himself thought he had already conveyed a life estate to the widow in the sixth paragraph of the will. Clearly, if the testator intended to and did convey an interest in the property under paragraph six of the will, the court will not by

construction create an ambiguity in the will by placing a construction on paragraph seven which is repugnant to the plain intention of the testator as set forth in paragraph six. We are of the opinion that paragraph seven creates no estate in the widow, Louisa C. Hart. The interest of the widow in the property described in paragraph seven is conveyed by paragraph six of the will, and the remainder interest only is devised by paragraph seven. Since paragraph seven conveys no new estate to the widow, the trial court properly decided that the only interest of the widow in the real estate described in paragraph seven was the interest she obtained under paragraph six of the will.

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

IN RE ESTATE OF GEORGE A. LUCE.
NEBRASKA WESLEYAN UNIVERSITY, APPELLANT, V. GEORGE A. LUCE ESTATE ET AL., APPELLEES.

291 N. W. 562

FILED APRIL 12, 1940. No. 30707.

Subscriptions. A pledge or donation to the funds of a university, payable after the death of donor, under the facts set out in the opinion, is subject to the implied condition that it is not to be paid until the debts of donor's estate have been satisfied.

APPEAL from the district court for Douglas county: JOHN W. YEAGER, JUDGE. *Affirmed.*

Stewart, Stewart & Whitworth and *Charles B. Paine,* for appellant.

De Lamatre & De Lamatre, Cranny & Moore and *William H. Thomas, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, CARTER, MESSMORE and JOHNSEN, JJ., and FALLOON, District Judge.

ROSE, J.

This is a controversy between Nebraska Wesleyan Uni-

versity, a nonprofit corporation maintaining an educational institution by that name in Lincoln, Nebraska, plaintiff, and Elizabeth S. Gillon, defendant, over the priority of claims against the estate of George A. Luce, deceased.

In a proceeding to settle decedent's estate, the county court of Douglas county allowed the claim of plaintiff in the sum of $10,000 on a par with that of defendant Elizabeth S. Gillon for $5,433.43.

The claim of the Nebraska Wesleyan University, plaintiff, rests on a subscription or pledge to the university by George A. Luce for $10,000, due and payable at his death. The claim of Elizabeth S. Gillon, defendant, consists of a balance of $5,433.43, due her from decedent's estate on a promissory note for borrowed money. Seeking subordination of the former claim to that of the latter, defendant appealed from the county court to the district court, where her claim against the estate was decreed to be superior to that of the Wesleyan University. Plaintiff appealed to the supreme court.

Is the claim on the note for borrowed money, like other claims of the same rank, payable from decedent's estate before applying any funds therein to payment of the subscription or pledge to funds of the university, as held by the district court? This is the question presented by the appeal. Neither the county court nor the district court on appeal disallowed the claim of plaintiff. There is precedent for the sufficiency of the consideration to support the pledge as a claim against the estate of decedent. *In re Estate of Griswold*, 113 Neb. 256, 202 N. W. 609. Plaintiff contends and argues:

"The question for the court to decide was, should the university's claim be allowed or disallowed? If allowed, it automatically fell into the fourth or last class of estate claims and was, therefore, on a parity with the claim of Mrs. Gillon and any other fourth class claims."

The classification of claims upon which plaintiff relies is found in the statute relating to insolvent estates, which provides:

"If the assets which the executor or administrator may have received and which can be appropriated to the payment of debts shall not be sufficient, he shall, after paying the necessary expenses of administration, pay the debts against the estate in the following order: First. The necessary funeral expenses, which shall be a preferred claim only to an amount not exceeding Two Hundred and Fifty Dollars ($250.00) for casket and services of undertaker. Second. The expenses of the last sickness. Third. Debts having a preference by the laws of the United States. Fourth. Debts due to other creditors." Comp. St. 1929, sec. 30-615.

The view of counsel for plaintiff seems to be that the claim of the university, if valid for any purpose or to any extent, is, under the statute quoted, a debt due to a creditor whose claim is not in the first or second or third class, but is one which automatically falls into the fourth class where claims therein are all of equal rank as to order of payment. The argument on this point is made in good faith to establish what is thought to be a legal right, but it fails to take into account that, from the nature of the contract and the date of its enforceability, the pledge must be held to be conditional as a matter of necessary public policy and of implied intention and understanding between the parties. The instrument itself is in the following language:

"Nebraska Wesleyan Endowment Fund

"Estate Pledge

"$10,000 Omaha, Nebraska, December 9th, 1921

"In consideration of my interest in Christian education and of other subscriptions to this endowment, building and expense fund, I hereby subscribe and promise to pay to the Nebraska Wesleyan University the sum of Ten Thousand and no/100 Dollars due and payable at my death. For value received, subject to the following condition:

"It is understood and agreed that a discount of five per cent. will be allowed on this pledge if the same shall be fully paid prior to my death.

"Omaha District George A. Luce
"Trinity Charge Laura E. Luce."

George A. Luce died June 21, 1931. It was stipulated that there was no consideration for the instrument beyond what was recited therein—"my interest in Christian education" and "other subscriptions to this endowment, building and expense fund." M. E. Gilbert, executive secretary of the university from 1925 to 1932, testified that it had an endowment fund, the income from which was used only for operating expenses, and that the pledge quoted was part of the endowment fund, but on cross-examination he stated in answer to a question: "Well, the note was always listed as an asset of the endowment; of course, not being money, it could not be used until it was paid." The pledge, though contractual in form as against the pledgor, was nevertheless donative as against the other creditors of his estate. While its contractual form created an enforceable right against the decedent's personal representative and his heirs, if funds were available for the purpose, it was not a right which in good conscience should be permitted to operate to the prejudice of those who had parted with money or property to the donor in reliance upon his estate. Nor would it be possible to contend, with any degree of plausibility, that the donor, who was a minister of the gospel, in making such a pledge to the cause of Christian education, payable on his death, or a Christian university in taking it, could have intended that it should operate to leave a debit for money, which he found it necessary to borrow, or any other similar obligation, unsatisfied on his death. Under the circumstances, the pledge must be held to be conditional, both as a matter of implied intention and of sound public policy, and to be payable or enforceable only if assets are available for that purpose after the decedent's actual debts have been paid. The situation presents no difficulty in the classification of claims under the statute. It is the same as if the contract had expressly provided that nothing should be paid thereon, until all the decedent's just and legal debts had been satisfied. Conditions necessarily may be implied in contracts as a matter of sound public policy and reasonably imputed intention. Thus, it is usually recognized that

the contract of a corporation to purchase its own stock is subject to the implied condition that such contract cannot be enforced if the corporation is insolvent or if the rights of creditors are prejudiced. 13 Am. Jur. 809, sec. 787; *Fremont Carriage Mfg. Co. v. Thomsen,* 65 Neb. 370, 91 N. W. 376. Whether the claim of Wesleyan University should be allowed, with an order directing that it should not be paid until the debts of the decedent were satisfied, or whether allowance should be withheld until such debts had been satisfied, is purely a procedural question that is unimportant, since in either case the result would be the same.

In re Estate of Griswold, 113 Neb. 256, 202 N. W. 609, 38 A. L. R. 858, cited to sustain the position of plaintiff, does not conflict with the views herein expressed. In that case the testamentary character of the instrument and the consideration therefor were the questions discussed and determined. Infringement by donation on the rights of creditors with superior claims and the statute classifying claims against the insolvent estates of deceased persons were not involved, but to guard against even an inference that a donor by his gift might so deplete his estate as to require his creditors to prorate their claims with donee, Judge Redick, author of the opinion, made the following significant observation:

"No difficulty is presented by the suggestion that a donor might so deplete his estate as to require his creditors to prorate their claims with the donee, for a contract perfectly valid between the parties may be void as to creditors."

The judgment of the district court is in harmony with the conclusion herein reached and is

AFFIRMED.

CARTER, J., concurring.

The writers of the dissenting opinions filed in this case charge that the court has indulged in judicial legislation which permits the probate judges of this state to arbitrarily direct the allowance and payment of claims according to their personal inclinations. I challenge these statements.

There can be no question that the contract evidencing the

claim of Nebraska Wesleyan University against the estate of George A. Luce was based upon a sufficient consideration as between the parties. That a contract may have a sufficient consideration to sustain it as between the parties themselves and yet be void as to existing, *bona fide* creditors is fundamental in this state. Love and affection may constitute a sufficient consideration for a contract or conveyance, but as to *bona fide* creditors such a consideration is generally condemned where the result is to deprive existing creditors of payment.

There is no question in my mind that the claim of Nebraska Wesleyan University is a fourth-class claim under the statute. This court in its opinion does not ignore the statute, or rewrite its terms. Neither does it attempt to legislate a fifth class into the statute as charged. The majority opinion merely carries out the contract of the parties as made by them. In determining the nature of the contract and the obligations created by it, it is the duty of this court to consider not only the literal wording of the instrument, but also the facts and circumstances surrounding its execution which throw light upon the intent of the parties.

Can it be said that, if a donor writes into his pledge that the amount is to be paid only after all his just debts are paid, the courts are powerless to give effect to his contract? Will the fact that it is a fourth-class claim require the county court to prorate it equally with other fourth-class claims regardless of the express provision of the contract to the contrary? Certainly, under such circumstances the claim would be a fourth-class claim payable only when all other claims had been paid. In so doing, the contract of the parties would have been carried out without reference to the statute providing for the classification of claims.

The instant case is no different. An interpretation of the contract in connection with all the facts and circumstances surrounding its execution reveals that the parties intended the pledge to be paid after all other creditors had been satisfied, and such interpretation becomes a part of the contract by implication. Any other conclusion would force the de-

ceased donor into the position of consummating a fraud upon his creditors. An enlightened public policy requires that no such result obtain where a contrary intent may reasonably be inferred from the evidence. The contract should be interpreted to avoid such an unmoral consequence.

The case resolves itself into an interpretation of the contract and not into one involving the construction of the statute classifying claims. To place an interpretation on the contract, other than is done in the majority opinion, would leave creditors at the mercy of unscrupulous debtors. To attain such a result by judicial interpretation is abhorrent to the sound jurisprudence of this country.

The *Griswold* case, relied on in the dissents, anticipates that the situation before us would arise. The author of that opinion disposes of the question in these words: "No difficulty is presented by the suggestion that a donor might so deplete his estate as to require his creditors to prorate their claims with the donee, for a contract perfectly valid between the parties may be void as to creditors." A consistent view of the situation requires the result obtained in the majority opinion.

No one believes more strongly than the writer in the principle of the division of powers of government and the necessity of each branch to confine itself within its respective sphere. It is the function of a court, however, to interpret contracts and give them the effect intended by the parties. This, and this only, have we done.

The attempt made in the dissenting opinions to make the literal wording of the statute classifying claims the basis of the decision is without foundation. Technical refinements cannot be permitted to overcome the plain intent of the parties. No more glaring example has been before us of the truth of the statement that "the letter killeth, but the spirit giveth life."

EBERLY, J., dissents.

SIMMONS, C. J., dissenting.

The facts of this case are not in dispute. Both plaintiff and defendant have claims which have been allowed against

the Luce estate. Their proper allowance is not questioned. The estate is probably insolvent. Were it not, it is obvious this case would not be here. The majority opinion holds that the claim of the defendant is superior to the claim of the plaintiff, and that defendant's claim (as well as all other allowed claims) must be paid in full before any payment can be made on plaintiff's claim.

It must be remembered that this instrument was given in 1921. By the decision *In re Estate of Griswold,* 113 Neb. 256, 202 N. W. 609, it then became and was "a valid contract supported by a sufficient consideration." (Page 271) It not only became an asset of the plaintiff at that time, but for approximately ten years thereafter during the lifetime of the maker, the plaintiff on its part continued the full performance of the consideration for the instrument. By its terms, the instrument was payable at a discount at the option of the maker at any time after its delivery. The defendant's claim is based upon promissory notes given in 1922 and 1925 after the instrument here involved had become a binding obligation of the maker. Defendant is a subsequent creditor. The evidence negatives any fraudulent intent on the part of any party to these transactions. Both claims are unsecured. The majority, therefore, hold that, where there are two unsecured allowed claims, based upon written instruments, which are contracts supported by a sufficient consideration, the claim, junior in time of the origin of liability, is superior, and that the junior obligation must be paid in full before the senior obligation may be paid even in part. I do not agree.

The plaintiff's assignments of error raise the one general question as to the power of the court to classify defendant's claim so as to make it a preferred claim to that of the plaintiff.

The proper allowance of plaintiff's claim, as payable from the assets of the estate of deceased, is established *In re Estate of Griswold, supra.* Defendant, while admitting the force of this decision, contends that, although the claim of plaintiff may be good as against the heirs of the deceased,

it is not good as against creditors who have claims based, as is defendant's, upon money loaned to the deceased.

The applicable provisions of the Nebraska statute are as follows:

It shall be the duty of the judge "to receive, examine, adjust, and allow all lawful claims and demands of all persons against the deceased." (Comp. St. 1929, sec. 30-601.) The court shall allow time "for the creditors to present their claims for examination and allowance." (Sec. 30-603.) "On the application of a creditor" further time may be allowed. (Sec. 30-605.) A "claim of the deceased" may be exhibited "in offset to the claims of the creditor." (Sec. 30-606.) The court shall fix a time for the executor or administrator to pay "the debts and legacies of the deceased." (Sec. 30-610.) The time for the payment of "debts and legacies" may be extended. (Secs. 30-611, 30-612, 30-613.) "If, after ascertaining the claims against any estate, it shall appear that the executor or administrator has in his possession sufficient to pay all the debts, he shall pay the same in full." (Sec. 30-614.) "If the assets * * * shall not be sufficient, he shall, * * * pay the debts * * * in the following order: First. The necessary funeral expenses, which shall be a preferred claim only to an amount not exceeding Two Hundred and Fifty Dollars ($250.00) for casket and services of undertaker. Second, the expenses of the last sickness. Third. Debts having a preference by the laws of the United States. Fourth. Debts due to other creditors." (Sec. 30-615.)

"If there shall not be assets enough to pay all the debts of any one class, each creditor shall be paid a dividend in proportion to his claim, and no creditor of any one class shall receive any payment until all those of the preceding class shall be fully paid." (Sec. 30-616.) "After the expiration of the time limited for the payment of debts," the court shall order "the payment of the debts and the distribution of the assets * * * among the creditors, as the circumstances of the estate shall require, according to the provisions of this article." (Sec. 30-617.) "If an appeal shall

have been taken, and shall remain undetermined, the court * * * may order a distribution among the creditors whose claims have been allowed, leaving * * * sufficient assets to pay" the disputed claim. (Sec. 30-618.) When the disputed claim is finally settled, the court shall order it "paid out of the assets retained, to the same extent and in the same proportion as the claims of other creditors." (Sec. 30-619.)

It is evident that the legislature classified all demands against a deceased as "claims;" that, when allowed, they become "debts" payable from the assets of the estate, that, if the assets are insufficient to pay the debts, said debts shall be classified and paid in the order specified in section 30-615, Comp. St. 1929, and that, if there are insufficient assets to pay the debts of creditors in any one class, "each creditor shall be paid a dividend in proportion to his claim." The term "creditor," as used in the statute, means the person who is the claimant against the estate, and, when the "claim" is allowed, the person to whom the "debt" is payable. The statute is complete in itself and is clearly intended to cover any situation that might arise in the administration of estates in Nebraska. It necessarily follows that plaintiff's claim as well as the claim of the defendant fall within the classification of "debts due to other creditors," and that, if the estate of the deceased is insolvent, each creditor (including the plaintiff) "shall be paid a dividend in proportion to his claim" on a parity with, and not subordinate to, any other creditor whose debt is in that classification.

The following authorities support the conclusion above stated.

"In most jurisdictions the word 'claimant' is used synonymously with 'creditor,' and the word 'claim' with 'legal demand for money.' The word 'claim' is also used synonymously with 'demand,' or 'debt.' 'Creditors of the estate' have been defined as persons who are such or become such because of dealings or transactions with the decedent during his lifetime. Their claims are debts or obligations with the origin of which the personal representative had nothing to do. The phrase 'creditors of the decedent' is more appropri-

ate as a designation of such creditors, however, in order to distinguish them from persons contracting with the executor or administrator upon the credit of the latter and of the estate; for it is settled in most of the states that creditors who become such after death of the decedent need not, and cannot, present claims and must rely on the individual liability of the representative." 3 Bancroft's Probate Practice, 1351, sec. 753.

" 'Creditors' of an estate are only those who have become such because of dealings or transactions with the testator in his lifetime, concerning whose claim the personal representative has nothing to do originally." 3 Schouler on Wills, Executors and Administrators (6th ed.) 2361, sec. 2711, footnote 2.

"The priorities of debts are governed wholly by the law of the jurisdiction in which the representative acts and from which he derives his authority." 24 C. J. 418.

"The common-law order of priority still exists in so far as it has not been expressly abrogated or superseded by the local administration laws; but the power of state legislatures to regulate the priorities of claims against decedent's estates is well settled, and the common-law rules have been very generally superseded by statutes, differing widely in the various jurisdictions, classifying the debts of decedents and specifying the order in which they shall be paid, or even, sometimes, abolishing all preferences and placing all debts on an equality with respect to the right of payment. The provisions of the local statutes fixing the order of payment are mandatory; they cannot be changed or disregarded by the court or by the representative, * * *." 24 C. J. 420.

"In the modern administration of estates there are no priorities among creditors except as given by statute." 24 C. J. 422.

"If an estate is solvent, there is no need for classifying its obligations according to priorities. But if solvency is doubtful and a dividend is to be declared, or if insolvency is established. the various obligations must be classified

according to their relative standing." 3 Bancroft's Probate Practice, 1739, sec. 1037.

"The court, in classifying obligations of an estate, has no authority to change the order prescribed by statute." 3 Bancroft's Probate Practice, 1740, sec. 1037.

"We have already seen, that executors and administrators are bound, in the payment of the debts of their testators and intestates, to observe the order of priority established by law." Woerner, The Law of Decedents' Estates, 316, sec. 364.

"When the time for proving or exhibiting debts has expired, or when, in those states in which classification is determined by the time of presentation, the time for proving the preferred class has expired, it is the duty of the executor or administrator to lay before the court a complete statement of the condition of the estate, showing what assets are in his hands, and what funds immediately available for the payment of debts; also the amount of debts proved against the estate, or admitted; what claims, if any, have been presented and not allowed, or which may be in suit and remain undetermined; and all other matters necessary to enable the court to ascertain the solvency or insolvency of the estate, and determine the amount of the dividend if insolvent. The court will thereupon decree the payment of the debts which have been proved, in the order of the classes to which they were assigned, each class to be paid in full before the next inferior class receives anything; and when the assets are sufficient to pay a part, but not the whole, of the debts of any one class, the creditors of that class will be payable *pro rata*." Woerner, The Law of Decedents' Estates, 350, sec. 401.

"After the preferred debts have been discharged, all liabilities of the deceased, of any kind or nature, not included in one of the preferred classes, are entitled to be paid *pro rata* * * *." Woerner, The Law of Decedents' Estates, 315, sec. 363.

"The rule now generally prevailing is that, aside from any preferences that may be provided for by statute, claims

of creditors against a decedent are, in case of the insolvency of his estate, to be paid *pro rata.*" 21 Am. Jur. 622, sec. 423.

"Once the assets have been applied in payment as far as they will go down the range of priority classes, claims in the last class to be reached can only be paid *pro rata.*" 3 Bancroft's Probate Practice, 1736, sec. 1035.

"Within any particular class of claimants, no one is entitled to preference over any other; * * *." 3 Bancroft's Probate Practice, 1737, sec. 1035.

Now let us consider the majority opinion.

It first holds that plaintiff's claim rests upon an instrument "due and payable" at death. As above pointed out, at the option of maker it was payable during his lifetime. The importance of this distinction is apparent. The majority next state: "The view of counsel for plaintiff seems to be that the claim of the university, if valid for any purpose or to any extent, is, under the statute quoted (sec. 30-615, Comp. St. 1929), a debt due to a creditor whose claim is not in the first or second or third class, but is one which automatically falls into the fourth class where claims therein are all of equal rank as to order of payment." Nothing in plaintiff's brief justifies the inference that plaintiff doubted that its claim was "valid for any purpose or to any extent." On the contrary, plaintiff contends that its claim is valid for all purposes. If the plaintiff's claim (and the defendant's also) does not fall "in the fourth class where claims * * * are all of equal rank as to order of payment," where, *under our statute,* does it fall? The majority opinion does not answer that question, and it should be answered. There is no other statutory class into which either the plaintiff's or the defendant's claim can fall, and within that class, there is no distinction and no priority. This court has no right or power to create an additional classification, or to create priorities within a class. (See authorities cited herein.) It is axiomatic that courts do not have legislative powers.

It is a "fundamental principle that the courts cannot set aside valid legislative acts or engraft amendments upon

them merely because the judges deem the legislation unwise or even unjust." *Paxton v. Sutton,* 53 Neb. 81, 73 N. W. 221. Is not the court doing exactly that in the instant case?

Contrary to the statement in the majority opinion, the plaintiff does not rely upon the *Griswold* case to sustain its position that it is entitled to payment on a parity with the defendant. It relies upon that case to sustain its position that it has a claim properly allowed based upon a contract supported by a sufficient consideration and one that it has performed. It relies upon the statutes of this state to sustain its position that the claim is entitled to be paid *pro rata* with the claim of the defendant.

The majority opinion states that "Infringement by donation on the rights of creditors with superior claims and the statute classifying claims against the insolvent estates of deceased persons were not involved" in the *Griswold* case. Agreed. But who determines what are superior claims —this court or the legislature? The authorities state that the legislature has that power, and our legislature has said what claims shall be superior to the one here in question by giving preference to (1) funeral expenses, (2) expenses of the last sickness, (3) debts having a preference under the laws of the United States. No other statutory preference exists. In my opinion, a preference is specifically denied by section 30-616, Comp. St. 1929.

The majority opinion states that plaintiff's claim should not be paid until "after decedent's *actual* debts have been paid" and until "decedent's *just* and *legal* debts" have been satisfied. How is plaintiff's allowed claim distinguished from an "actual" "just" or "legal" debt? By statute, hereinbefore cited, an allowed claim is a debt of the estate. Obviously, plaintiff's claim should not have been allowed unless it was an actual legal claim, which, when allowed, became an actual legal debt of the estate. Defendant does not appeal from the allowance. This court should not place plaintiff in the position of presenting a fictitious, unjust, illegal claim, of having it allowed, and then insisting upon payment. Yet, it must be conceded that, in order to sus-

tain its reasoning, the majority opinion places plaintiff in such a position.

The majority state that plaintiff's argument "fails to take into account that, from the nature of the contract and the date of its enforceability, the pledge must be held to be conditional as a matter of necessary public policy and of implied intention and understanding between the parties." Let us examine that. The parties to the instrument were a minister of the gospel and an institution of higher learning in this state. They were fully competent to express their intent in the written contract, which the one executed and the other accepted and performed. Their contract was valid, legal, and enforceable as written. (See *Griswold* case.) This court now, 18 years later, writes into that contract a condition, based upon "an implied intention and understanding," that the maker's estate was not to be liable therefor until all other claims were fully paid. This court has said: "While a court may construe and enforce contracts duly entered into, it is not the province of the judiciary to make contracts for parties." *TePoel v. Shutt,* 57 Neb. 592, 78 N. W. 288. In my judgment, the majority are now making a new contract for the parties after one is dead and the other has performed.

The majority state the condition is there "as a matter of necessary public policy." The public policy of this state, as declared by the cited legislative provisions, is controlling upon the courts. The courts have no right to ignore or override that declared public policy.

In *State v. Price,* 129 Neb. 433, 441, 261 N. W. 894, this court quoted with approval the following from *Mieyr v. Federal Surety Co.,* 97 Mont. 503, 34 Pac. (2d) 982: "What is the 'public policy' of a state and what is contrary to it is not to be measured by the private convictions or notions of the persons who happen to be exercising judicial functions, but by reference to the enactments of the lawmaking power, and, in the absence of them, to the decisions of the courts. When, however, the legislature has spoken upon a particular subject and within the limits of its constitutional powers, its utterance is the public policy of the state."

"No duty of this court is more manifest and exacting than the duty to avoid trespassing upon the province of the legislature. * * * It is not for this court to determine the legislative policy, nor to criticize that policy when adopted by the lawmakers. If apparently matters have been omitted in legislation which would have been supplied if brought to the attention of the lawmakers, it is not within the province of the court to supply such omissions." *Gaster v. Estate of Gaster,* 92 Neb. 6, 137 N. W. 900.

Subsequently in the opinion the majority repeat their statement about "implied" conditions, "sound public policy," and "imputed intentions," but do not cite any authority, judicial or statutory, to sustain their position. I am not unmindful that the majority state: "Thus, it is usually recognized that the contract of a corporation to purchase its own stock is subject to the implied condition that such contract cannot be enforced if the corporation is insolvent or if the rights of creditors are prejudiced." (Citing 13 Am. Jur. 809, sec. 787.) However, this is not a contest between a stockholder and a creditor. It is a contest between two creditors who have allowed claims which fall into the same statutory classification. Obviously, the cited authority is not in point. The majority also cited *Fremont Carriage Mfg. Co. v. Thomsen,* 65 Neb. 370, 91 N. W. 376. It is interesting to note that in that case the corporation was not insolvent, and the stockholder recovered on his contract of repurchase. So, I submit that the majority opinion stands without support of any authority. Surely, if the reason of the majority is sound, judicial decision could be found to support it.

The fault with the majority opinion is that it adopts the argument and reasoning that was rejected in the *Griswold* case, and, contrary to that decision, treats the Luce note as a gift, without a consideration, and not as a valid contract based upon a sufficient consideration. For the majority next state: "The pledge, though contractual in form as against the pledgor, was nevertheless donative as against the other creditors of his estate. While its contractual

form created an enforceable right against the decedent's personal representative and his heirs, if funds were available for the purpose, it was not a right which in good conscience should be permitted to operate to the prejudice of those who had parted with money or property to the donor in reliance upon his estate." Again no citation of authority is given. What is the effect of this statement? First, as between the plaintiff and the beneficiaries of the estate of the "pledgor," the instrument is a contract founded on a sufficient consideration. (Such is the holding in the *Griswold* case.) Second, as between the plaintiff and the defendant (another creditor), the instrument was a donation, a gift. A gift is a voluntary transfer of property "without any consideration." A gift "not only does not require a consideration, but there can be none; if there is a consideration for the transaction it is not a gift." 28 C. J. 620. It is obvious that the instrument cannot be both a contract based upon a sufficient consideration and a gift without any consideration. Yet the majority reason that this instrument is a valid contract, the proper foundation for a claim allowable against the estate, and a gift not good as against "other creditors." Not only is that so, but the question of whether it is a contract or a gift is made to depend not upon anything said or done by the parties at the time the instrument was executed, but upon the question as to whether or not the maker's estate is solvent 11 years after the contract "and/or" gift was made. The majority reach the somewhat remarkable conclusion that, if the estate is solvent, then this instrument is a contract based on a sufficient consideration, and if the estate is insolvent, then it is a gift without consideration, good as against heirs, but not good as against "other creditors." Such a result is not based upon either good reasoning or good law.

The syllabus likewise classifies the plaintiff's claim as "a pledge or donation," refuses to recognize its status as a debt of the estate, contrary to the holding in the *Griswold* case, and refuses to recognize its statutory status as an allowed debt of the estate.

But in any event, the plaintiff has an allowed claim against the estate. Defendant has an allowed claim against the estate. The majority cite section 30-615, Comp. St. 1929, which provides that "debts due to other creditors" are in the fourth class. The majority, ignoring the fact that the legislature provided no priorities within that class, construe the instrument to create priorities within the class and state: "The situation presents no difficulty in the classification of claims under the statute." If well-defined and long-established rules cited herein are to be ignored, then I admit no difficulty is presented.

However, the majority entirely ignore section 30-616, *supra,* which provides: *"If there shall not be assets enough to pay all the debts of any one class, each creditor shall be paid a dividend in proportion to his claim."* By section 30-617, *supra,* the county court is required to make an order for the payment of debts "according to the provisions of this article." I have heretofore quoted from several recognized authorities all to the effect that the statutory provisions are mandatory, that legislative classifications are controlling, and cannot be changed or disregarded by the courts, and that, in case of insolvency, creditors within a class are to be paid *pro rata.* Our statute is in accord with those texts. The majority cite no authorities to the contrary. Is every one out of step, including our legislature, and excluding a majority of this court? Where is the authority for this court to ignore the statutes classifying claims and providing for *pro rata* payment within a class?

Bearing in mind the fact that plaintiff's claim is an allowed claim or debt of the estate, is not the effect of the majority decision to set aside that allowance and allow the claim conditioned upon there being assets in the estate from which it can be paid after all other allowed claims are paid? If so, where is the authority, statutory or otherwise, for this court to enter such an order?

If this court has the power to create classes A and B within the statutory claims of the fourth class and put all claims except the plaintiff's in class A, then what is to pre-

vent the court from hereafter creating as many subclasses as there are claims, and ordering their payment in the order that the court may deem wise and just and in accord with a "necessary public policy?" Does not the court thereby invade a field that has been fully covered by legislative provisions? Does it not in effect repeal the statutory order of payment of claims? Has not this court violated the constitutional injunction that "no person or collection of persons being one of these departments (legislative, executive and judicial) shall exercise any power properly belonging to either of the others except as hereinafter expressly directed or permitted?" Const. art. II, sec. 1. Where is the direction or permission to this court to invade this field wherein the legislature has fully directed what shall be done?

In my opinion, the courts do not have the authority to enter the order here affirmed. We should not disturb the probate law of this state with reference to the classification of claims in order to prevent what, to some of us, appears to be an inequitable result. If this opinion becomes the law of Nebraska, then every probate judge will feel that he has the right to determine "as a matter of necessary public policy" whether or not the payment of one claim in an insolvent estate should be preferred to another, and instead of having an orderly payment of claims, based upon the statutes, we will have the payment of claims based upon the personal views of the 93 probate judges of this state.

MESSMORE, J., dissenting.

I agree that the subscription, note or pledge made to Nebraska Wesleyan University by George A. Luce for $10,000, due and payable at his death, does, as stated in the majority opinion, constitute a just and enforceable claim against his estate. Under section 30-615, Comp. St. 1929, it is a claim which would fall within the fourth class. The majority opinion states: "It was not a right which in good conscience should be permitted to operate to the prejudice of those who had parted with money or property to the donor in reliance upon his estate," and that such pledge or

donation to the fund of the university, payable after the death of the donor, under the facts set out in the opinion is subject to the implied condition that it is not to be paid until the debts of donor's estate have been satisfied.

The contract provides: "In consideration of my interest in Christian education and of other subscriptions to this endowment, building and expense fund (an adequate consideration), I hereby subscribe and promise to pay to the Nebraska Wesleyan University the sum of Ten Thousand and no/100 Dollars due and payable at my death (a direct promise to pay from the assets of his estate at a given time,—his death). For value received," etc.

The majority opinion, in substance, says that in equity and good conscience this debt should be subsequent to and follow after, as far as allowance or payment is concerned, debts admittedly in the same class, the exception being that where money was advanced and used by the decedent during his lifetime such obligations against his estate precede claims of the kind in question.

The language used in section 30-615, Comp. St. 1929, is unambiguous, direct and complete, and fully discloses the classification of claims. To interpret such provision as stated in the majority opinion is tantamount to judicial legislation, in creating a fifth class of claims, or an exception to the specific language of the statute. The language of the statute under the fourth classification is: "Debts due to other creditors." This could have only one meaning: All debts owing by the estate to all other creditors, not specifically excepted by the preceding provisions of the statute, fall within the category of fourth-class claims.

WILLIAM J. RITTER ET AL., APPELLANTS, V. DRAINAGE DISTRICT NO. 1 OF OTOE AND JOHNSON COUNTIES, APPELLEES.
291 N. W. 718

FILED APRIL 12, 1940. NO. 30776.

1. **Drains.** It is a duty of the board of supervisors of a drainage district organized under the legislative act of 1905 to repair ditches which become ineffective. Comp. St. 1929, sec. 31-463.
2. ———. The incorporation of a drainage district under the legislative act of 1905, the written promises in the charter or obligations of the landowners to pay assessments for drainage, the construction by the incorporated district of the drainage system pursuant to statute and the levy and payment of such assessments create contracts between the district and the individual landowners. Comp. St. 1929, sec. 31-401 *et seq.*
3. **Constitutional Law.** Where contractual and vested rights are created pursuant to statute, they cannot be destroyed by a subsequent act of the legislature.
4. ———. "A legislative act will not be permitted, even if an attempt so to do is disclosed, to operate retrospectively where it will have the effect to invalidate or impair the obligation of contracts or interfere with vested rights." *Travelers Ins. Co. v. Ohler*, 119 Neb. 121, 227 N. W. 449.

APPEAL from the district court for Otoe county: WILMER W. WILSON, JUDGE. *Reversed.*

Spencer & Neumeister, for appellants.

Moran & James and *Otto H. Wellensiek, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

ROSE, J.

This is a suit in equity for a mandatory injunction requiring defendants, Drainage District Number 1 of Otoe and Johnson counties and the members of the board of district supervisors, to repair portions of its drainage system to prevent the overflow of plaintiffs' lands and the destruction of their crops by water. Plaintiffs seek also an injunction to prevent defendants, including the clerk of the district court for Otoe county, from holding an election to vote on the dissolution of the drainage district.

Plaintiffs are landowners who paid assessments for drainage which, through failure of the district to repair ditches, no longer protects their lands or crops from damages by water. Plaintiffs sue also for others similarly situated.

The drainage district was duly incorporated in 1910 pursuant to the drainage law of 1905 and amendments thereof. Laws 1905, ch. 161; Laws 1907, ch. 153; Laws 1909, ch. 150; Comp. St. 1929, sec. 31-401 *et seq.* The statute of 1905 provides for the drainage of lands in the district and for protection thereof from the effects of water. The regularity and validity of the incorporation of the district under its charter were confirmed by the district court for Otoe county and by the supreme court. *Drainage District v. Wilkins*, 93 Neb. 567, 141 N. W. 151.

The charter provides that the corporation shall continue for 50 years and it therefore has 20 years to run unless sooner dissolved. The improvement district contained approximately 16,090 acres of land. The articles of incorporation named each landowner and described his tract. In the feasible, engineering project, the benefits to land in the district were estimated at $566,050.66 and the cost of construction at $215,843.96. The ditches, dikes, drains and other improvements were made according to the plans adopted. Total benefits to the extent of 48½ per cent. only were levied on the lands in the entire district. Plaintiffs paid the assessments levied against their lands.

Plaintiffs allege in their petition that improvements formerly benefiting their lands no longer serve the purposes of drainage; that dikes have been washed away and ditches filled up; that defendants refuse to make the necessary repairs; that they have on hand a fund of $800 which they threaten to use in calling and holding an election to dissolve the district pursuant to the act of 1933. Comp. St. Supp. 1939, sec. 31-475.

That act provides for the dissolution of a drainage district organized under article 4, ch. 31, Comp. St. 1929, and directs how the election shall be called and conducted. That there shall be no outstanding indebtedness of the district is

a condition of dissolution by election. The act of 1933 is alleged to be void, if construed to operate retroactively and prevent the relief sought by plaintiffs. In different forms the sufficiency of the petition to state a cause of action was raised by demurrers.

The district court heard the cause on the demurrers, special and general, and held that the act authorizing the dissolution of the district by voters at an election was constitutional; that the petition does not disclose any outstanding indebtedness of the district; that plaintiffs have no contractual or vested rights to prevent the election to dissolve the district; that the petition does not state facts sufficient to constitute a cause of action; that a former temporary injunction was wrongfully granted; that the demurrers should be sustained; that the relief sought by plaintiffs should be denied. Plaintiffs appealed.

The rulings of the district court conform to the views of defendants and are defended as sound in elaborate arguments in which many cases are cited.

The position of plaintiffs is that the drainage act, the valid proceedings under it, the signing of the articles organizing the public corporation containing the promises and the obligations of the signers to pay assessments for drainage, the duty of the district to make repairs for 50 years, the construction of the feasible drainage project and the levy and payment of assessments on the property of the landowners for drainage purposes constitute a binding contract between the district and the individual owners of benefited lands therein.

The legislature provided by law for the creation of a public body or corporation to deal with individual landowners for the drainage of their lands on equal terms measured by individual benefits. The drainage district, acting through its board of supervisors, exercised public powers and performed public duties in constructing a drainage system to be in operation 50 years. The public corporation in the performance of such duties acted as a unit. Each landowner acted for himself in making promises and

in paying his proportionate share of the entire cost of the improvement by means of assessments for individual benefits. One of the articles of incorporation provides:

"The persons whose names are hereto subscribed are a majority in interest of the owners of all of the lands included within said district above described, and the undersigned are willing and hereby obligate themselves to pay the tax and taxes that may be levied and assessed to pay the expenses of making the improvements for which this district is formed."

The statute which is part of the charter provides:

"If at any time after the final construction of such improvement the same shall become out of repair, obstructed, inefficient, or defective from any cause, the board of supervisors may order an assessment upon the lands and property benefited by the drainage system for the purpose of placing the same in proper and suitable condition for drainage purposes." Comp. St. 1929, sec. 31-463, "may" therein being mandatory. *Mooney v. Drainage District,* 126 Neb. 219, 252 N. W. 910.

The duty of the board of supervisors to make the necessary repairs, as the statute has been construed, is as imperative as the duty to complete the drainage system and levy and collect assessments for benefits in the first instance. *Mooney v. Drainage District,* 134 Neb. 192, 278 N. W. 368. In an earlier opinion in the same case it was said:

"Whenever such drainage system becomes out of repair, defective, or inefficient for any reason, it is its (district's) duty to improve and repair it, within the limit of its power, so that it may serve the purpose for which it was constructed, and to the end that the landowners may receive the benefits for which the land is assessed." *Mooney v. Drainage District,* 126 Neb. 219, 233, 252 N. W. 910.

The written promises or legal obligations of the landowners to pay assessments for drainage improvements and the statutory duty of the district to construct the drainage system, keep the drains in repair, and levy the necessary taxes or assessments to pay the expense of drainage, and

the performance of duties and obligations by both district and landowners created contractual relations through which the landowners acquired vested property rights in the improvement of their lands by drainage. The system of drainage contemplated by the legislature did not mean a plan furnishing 50-year drainage for some landowners in the district and denying the same protection to others on an equal footing. A law text reads thus:

"It has become the established law that a legislative enactment, in the ordinary form of a statute, may contain provisions which, when accepted as the basis of action by individuals or corporations, become contracts between them and the state within the protection of the clause of the federal Constitution forbidding impairment of contractual obligations." 6 R. C. L. 338, sec. 331. See, also, 12 C. J. 969.

An opinion of the supreme court of the United States, referring to contracts arising from statutes, contains this language:

"And in regard to the cases of contract, while the principle that a contract may arise from a legislative enactment has been reiterated times without number, it must always rest for its support in the particular case upon the construction to be given the act." *American Smelting & Refining Co. v. Colorado*, 204 U. S. 103, 115, 27 S. Ct. 198.

The drainage act, the proceedings thereunder and the payments by the landowners for drainage as the facts are alleged in the petition bring the case at bar within the foregoing principle applicable to contracts arising from legislative enactments.

The contractual and vested rights of plaintiffs cannot be taken away by the subsequent act authorizing dissolution of the drainage district by the ballots of landowners who may still enjoy the benefits of drainage, while plaintiffs who are landowners in the same district with the same rights are deprived of drainage. The law applicable has been stated as follows:

"A legislative act will not be permitted, even if an at-

tempt so to do is disclosed, to operate retrospectively where it will have the effect to invalidate or impair the obligation of contracts or interfere with vested rights. 2 Lewis' Sutherland, Statutory Construction (2d ed.) sec. 642; *United States v. Jackson*, 143 Fed. 783; *Hoyt Metal Co. v. Atwood*, 289 Fed. 453; *Spitzer v. Healy*, 218 N. Y. 737." *Travelers Ins. Co. v. Ohler*, 119 Neb. 121, 227 N. W. 449. See, also, *Mooney v. Drainage District*, 134 Neb. 192, 278 N. W. 368.

In sustaining the demurrers to the petition and in refusing to grant plaintiffs equitable relief, the district court erred. The judgment below is therefore reversed and the cause remanded for further proceedings.

REVERSED.

NELSON-JOHNSTON & DOUDNA, APPELLANT, V. METROPOLITAN UTILITIES DISTRICT, APPELLEE.

291 N. W. 558

FILED APRIL 12, 1940. No. 30703.

1. **Municipal Corporations.** A district organized under the provisions of articles 10 and 11, ch. 14, Comp. St. 1929, is a public corporation empowered to perform functions usually performed by cities of the metropolitan class and is, in its broader sense, a municipal corporation.
2. ———. A municipal corporation may exercise only such powers as are expressly granted, those necessarily or fairly implied in or incidental to powers expressly granted and those essential to the declared objects and purposes of a municipality.
3. ———. Statutes granting powers to municipalities are to be strictly construed, and where doubt exists such doubt must be resolved against the grant.
4. ———. But where a power is granted to a municipality in its proprietary capacity, such as the power to manufacture, sell and distribute gas, the power is implied to do whatever is reasonably necessary to effectuate the purposes and objects for which the grant of power was made.
5. ———. The authority given a municipality to engage in the operation of a business enterprise carries with it the power to conduct it in the same manner in which a private corporation would deal with its property under similar circumstances.
6. ———. A municipal corporation having the power to manu-

facture, sell and distribute gas to its inhabitants has the implied power to engage in the selling of gas appliances, such business being intimately connected with and incidental to the sale and distribution of gas, in that it directly and proximately tends to accomplish the general purpose and object for which the primary power was granted.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed.*

Leon, White & Lipp, for appellant.

Dana Van Dusen, contra.

A. G. Humphrey, J. R. Mueller, Beeler, Crosby & Baskins, Paul C. Holmberg, J. C. Reavis, Thomas Stibal, A. J. Denney, John E. Mekota, Clyde Barton, Harry K. Livingston, C. R. Stasenka, P. M. Everson, John Ferneau, C. A. Sorensen and *C. N. McElfresh, amici curiæ.*

Heard before SIMMONS, C. J., ROSE, PAINE, CARTER, MESSMORE and JOHNSEN, JJ., and ELLIS, District Judge.

CARTER, J.

This is an appeal from a decree of the district court for Douglas county sustaining defendant's general demurrer to plaintiff's petition filed to secure an injunction against alleged unlawful trading on the part of the Metropolitan Utilities District of the city of Omaha. The plaintiff refused to plead further and plaintiff's petition was thereupon dismissed. Plaintiff appeals.

The plaintiff is a corporation with its principal place of business within the territory served by the Metropolitan Utilities District, a taxpayer of the city of Omaha and a patron and user of the gas and water facilities of the district. The defendant is a municipal corporation created and existing under the laws of the state of Nebraska (Comp. St. 1929, secs. 14-1001 to 14-1030 and 14-1101 to 14-1105) and empowered by such laws to engage in the business of supplying the inhabitants of the city of Omaha and surrounding territory with water and gas, and to manufacture and produce coke and by-products in connection with the

operation of its gas plant, and to sell and deliver the same to its customers.

The record shows that plaintiff is now and for many years has been engaged in the sale at retail of gas ranges, gas stoves, gas heaters, mechanical refrigerators and other household appliances in the city of Omaha. Plaintiff further alleges that the defendant district is now operating a retail appliance store in the city of Omaha and is selling and offering for sale gas stoves, gas ranges, gas heaters, mechanical refrigerators and other household appliances, that defendant carries on an extensive advertising campaign, including the giving to its customers free merchandise and articles used in connection with the cooking and preparation of foods, and that it extends to its patrons unusual and long terms of credit on merchandise sold which private competitors cannot meet. It is further alleged that there are numerous private mercantile establishments engaged in the gas-appliance business in the city of Omaha, that there is no scarcity of such appliances and that there is no price fixing by dealers, combinations or trusts to stifle competition or thwart the beneficent results of free enterprise.

Plaintiff contends that defendant is unlawfully engaging in the gas-appliance business contrary to the statutory law of this state and to the damage of the plaintiff, and that it is entitled to an injunction restraining the unlawful acts of this defendant in carrying on such gas-appliance business.

The defendant is a municipal corporation created by statute to take over, control and operate the artificial gas system of the city of Omaha, and other public utilities. *Keystone Investment Co. v. Metropolitan Utilities District*, 113 Neb. 132, 202 N. W. 416. A noted text-writer defines a municipal corporation as follows: "We may, therefore, define a municipal corporation in its historical and strict sense to be the incorporation, by the authority of the government, of the inhabitants of a particular place or district, and authorizing them in their corporate capacity to exercise subordinate specified powers of legislation and regula-

tion with respect to their local and internal concerns. This power of local government is the distinctive purpose and the distinguishing feature of a municipal corporation proper. The phrase 'municipal corporation' is used with us in general in the strict and proper sense just mentioned; but sometimes it is used in a broader sense that includes also public or quasi corporations, the principal purpose of whose creation is as an instrumentality of the state, and not for the regulation of the local and special affairs of a compact community." 1 Dillon, Municipal Corporations, 59. While the Metropolitan Utilities District does not have all the attributes of a municipal corporation strictly defined, yet it performs the functions of a municipal corporation and in its broader sense is a municipal corporation.

The rule has long been established in this state that a municipal corporation "possesses, and can exercise, the following powers, and no others; First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable." *Christensen v. City of Fremont*, 45 Neb. 160, 63 N. W. 364. See, also, *Consumers Coal Co. v. City of Lincoln*, 109 Neb. 51, 189 N. W. 643; *Schroeder v. Zehrung*, 108 Neb. 573, 188 N. W. 237.

The right to own and operate a water plant was first granted to the city of Omaha by special enactment of the legislature. Subsequently, the control and management was lodged with the defendant district. The right to own and operate a gas-manufacturing plant and distribution system was likewise added to the powers and duties of the district. The effect of these statutes is to create a governmental agency which has for its purposes the control and operation of the proprietary functions which ordinarily would have been performed by the city of Omaha. It seems to us, therefore, that the powers of the district must be tested on the same basis as if being performed by the city itself. It is conceded that there is no power granted by express provi-

sion of any statute permitting the district to engage in the sale of gas appliances. The question resolves itself into one as to whether the right to engage in the sale of gas appliances can fairly be implied from the powers granted. In other words, does the fact that the district is authorized to manufacture, sell and distribute gas to the inhabitants of the district imply the power to sell gas appliances?

The powers granted to a municipal corporation can be divided into two general classes,—the one including those which are legislative, public or governmental, and import sovereignty; the second, those which are proprietary or quasi private, conferred for the private advantage of the inhabitants and the city itself as a legal entity. Where the legislature creates a separate municipal corporation to perform the functions of a city usually regarded as proprietary, such municipal agency is just as much engaged in proprietary functions as if the city was doing it itself. We must, therefore, construe the granted powers as proprietary in character as distinguished from a governmental grant of authority. We think that a grant of power to a municipal corporation in its proprietary capacity stands upon the same footing as a similar grant to a private corporation by its charter. The grant of power to control and operate a public utility necessarily implies all the incidental powers to do anything that any business man or corporation ought to do in operating a successful business enterprise. Certainly, a private corporation engaged in the manufacture and distribution of gas may sell gas appliances to the purchasing public. The sale of such appliances by private utility companies tends to increase the volume of gas sales and thereby increases the economic efficiency of the corporation. Such results are likewise necessary to the proper operation of a municipally owned business. Applying the same rule to the proprietary powers of a municipal corporation as to the powers enjoyed by a private corporation, we conclude that the defendant district has the implied power to engage in the gas-appliance business. Whether such municipal corporation in its proprietary capacity may engage in the sale

of such appliances at a loss, or where it will create an indebtedness against the district, or permanently impair the income of the district derived from the sale of gas, we do not find it necessary to answer in this case. We merely hold that under the facts presented to us the defendant district has the implied power to engage in the gas-appliance business.

It has been held that a municipality authorized to own and operate an electric-light plant has the implied power to sell electrical appliances. *Andrews v. City of South Haven,* 187 Mich. 294, 153 N. W. 827. It has also been held that a municipality engaged in operating a power and light plant may sell its excess steam and install the appliances necessary to enable it to meet the demand. *Milligan v. City of Miles City,* 51 Mont. 374, 153 Pac. 276. A municipality, in installing electric wiring in private houses for purposes of furnishing electricity for electric ranges, stoves, etc., is governed by the same laws and could exercise the same rights as a private corporation engaged in the same business. *Hamler v. City of Jacksonville,* 97 Fla. 807, 122 So. 220.

In *Henry v. City of Lincoln,* 93 Neb. 331, 140 N. W. 664, this court said: "In the light of the above authorities, we conclude that in the installation and management of its waterworks system defendant must be treated as a private corporation engaged in a purely business enterprise, as separate and distinct from the performance of its governmental functions and corporate duties as if it were not a municipal corporation at all, and that its liability to plaintiff must be determined solely under the law and procedure applicable to a private corporation and its employee." The rule was subsequently followed in *City of University Place v. Lincoln Gas & Electric Light Co.,* 109 Neb. 370, 191 N. W. 432, and *Cook v. City of Beatrice,* 114 Neb. 305, 207 N. W. 518. We think this is a clear indication of the rule to be applied in the instant case.

When a municipal corporation engages in a business enterprise which is reasonably necessary to the performance of its public duty, or which materially advances it, or even

where the enterprise merely affords the public greater convenience in the use of the municipality's facilities, the participation in such an enterprise is, by the weight of authority, held to be a power implied from or incidental to its expressly granted powers. Certainly no private company could await the initiative of its prospective customers, nor the efforts of others, to sell appliances before doing business. It would have to rely upon its own efforts in this respect. A municipality engaged in the gas business must meet the same problems. Until the district is equipped with gas appliances, there could be no gas business.

We think the correct rule is: If a municipal corporation legally acquires a public utility plant, with the right to operate it for the benefit of its inhabitants, it would likewise acquire by implication the right to do all the things that a private owner might do in order to economically and efficiently furnish to the citizen the product in which he deals. The sale of gas-appliances by the defendant district is intimately connected with and incidental to the sale of gas, and is, therefore, an implied power of such district because it directly and proximately tends to accomplish the general purpose for which the district was established and operated. This, in our judgment, states the more modern rule adopted by a majority of the states which have passed on the question.

We have examined the cases arriving at a contrary conclusion, including *MacRae v. Selectmen of Town of Concord,* 6 N. E. (2d) (Mass.) 366; *Keen v. Mayor of Waycross,* 101 Ga. 588, 29 S. E. 42; *Attorney General v. Corporation of Leicester* (1910) 2 Ch. Div. (Eng.) 359; *In re Opinion of the Justices,* 14 N. E. (2d) (Mass.) 392, and *Adie v. Mayor of Holyoke,* 21 N. E. (2d) (Mass.) 377. These cases invoke the strict construction usually applied to grants of governmental powers to a municipality. We are unwilling to follow so strict a construction in dealing with statutes granting powers to a municipality in its proprietary capacity.

We conclude therefore that the trial court properly sustained the demurrer to plaintiff's petition.

AFFIRMED.

ELI C. BURKE, APPELLANT, V. WESTERN UNION TELEGRAPH COMPANY, INC., APPELLEE.

291 N. W. 555

FILED APRIL 12, 1940. No. 30815.

1. **Commerce.** By enactment of federal statutes on the subject (36 U. S. St. at Large, 539, and 48 U. S. St. at Large, 1064), congress has occupied the entire field of interstate business of telegraph companies so as to exclude state action, except where specifically authorized.
2. **Courts.** Where the supreme court of the United States has interpreted and construed an act of congress, the meaning placed thereon by that court governs the action of state courts.
3. **Damages.** The applicable rule announced by the federal courts is that no recovery of damages can be had for mental pain and anguish where no injury is done to person, property, health or reputation.
4. **Telegraphs and Telephones.** No recovery can be had for mental pain and anguish growing out of the negligent failure of a telegraph company to deliver an interstate telegram, for the reason that the federal courts do not permit a recovery for such injuries.

APPEAL from the district court for Douglas county: JOHN W. YEAGER, JUDGE. *Affirmed.*

Charles E. Foster, Henry G. Peterson and *Foster & Yates*, for appellant.

Francis R. Stark and *Ellick, Fitzgerald & Smith, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

CARTER, J.

This is an action to recover damages for the nondelivery of a telegram sent to the plaintiff announcing the death of his father and requesting his attendance at the funeral. At the close of plaintiff's evidence the trial court directed a verdict against the plaintiff and dismissed the action. Plaintiff appeals.

The record discloses that on July 22, 1938, Gladys Duesler, a sister of the plaintiff residing at Oklahoma City, Oklahoma, filed a telegram with the defendant company at its

office in Oklahoma City, which in substance said: "Father died today. Come at once." The telegram was never delivered and plaintiff was not informed of his father's death until July 30, 1938, after the funeral had been held. Plaintiff alleges and offered evidence to prove that the negligence of the defendant in failing to deliver the message caused a severe shock to his nervous system and great mental pain and anguish for which he asked for damages. It is the contention of the defendant that the case is controlled by federal laws which preclude a recovery for mental anguish or for physical suffering growing out of mental anguish. The trial court adopted this view and directed a verdict against plaintiff.

It is not disputed that the telegram was filed with the defendant company in Oklahoma City, Oklahoma, and not delivered to the plaintiff in Omaha, Nebraska, as directed. That it was an interstate message cannot be questioned. *Western Union Telegraph Co. v. Czizek,* 264 U. S. 281, 44 S. Ct. 328, 68 L. Ed. 682; *Postal Telegraph-Cable Co. v. Eubanks,* 121 Miss. 530, 83 So. 678; *Western Union Telegraph Co. v. King,* 188 Ga. 95, 2 S. E. (2d) 909.

Congress has the power under the Constitution of the United States to regulate commerce among the several states. U. S. Const. art. I, sec. 8. In 1910 congress exercised its constitutional power by passing an act regulating interstate communications by telegraph. 36 U. S. St. at Large, 539. The supreme court of the United States subsequently construed this act in *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.,* 251 U. S. 27, 40 S. Ct. 69, 64 L. Ed. 118, and *Western Union Telegraph Co. v. Esteve Bros. & Co.,* 256 U. S. 566, 41 S. Ct. 584, 65 L. Ed. 1094, and determined that an action for damages for failure to deliver an interstate telegram was governed exclusively by the federal law. This holding was recognized and followed by this court in *Dunning v. Western Union Telegraph Co.,* 108 Neb. 422, 187 N. W. 890, wherein we said: "The federal government being supreme in the control of interstate commerce, as held by the supreme court of the United States, the state

cannot of course interfere with that control. And it may be added that the act is so far-reaching that the receiver of an interstate telegram, as well as the sender, comes within its meaning."

Congress has, under the Communications Act of 1934 (48 U. S. St. at Large, 1064), continued to occupy the field of interstate business of telegraph companies to such an extent that state action is excluded unless there be an express exception. *Western Union Telegraph Co. v. Boegli*, 251 U. S. 315, 40 S. Ct. 167, 64 L. Ed. 281; *Western Union Telegraph Co. v. Priester*, 276 U. S. 252, 48 S. Ct. 234, 72 L. Ed. 555; *Western Union Telegraph Co. v. King*, 188 Ga. 95, 2 S. E. (2d) 909.

When the supreme court of the United States has construed an act of congress, the interpretation made by that court controls the action of the state courts. *Dunning v. Western Union Telegraph Co.*, 108 Neb. 422, 187 N. W. 890.

The purpose of the congress in occupying the field of the interstate business of telegraph companies is well expressed in *Western Union Telegraph Co. v. Esteve Bros. & Co.*, 256 U. S. 566, 41 S. Ct. 584, 65 L. Ed. 1094, wherein the court said: "Thereafter, for all messages sent in interstate or foreign commerce, the outstanding consideration became that of uniformity and equality of rates. Uniformity demanded that the rate represent the whole duty and the whole liability of the company. It could not be varied by agreement; still less could it be varied by lack of agreement. The rate became, not as before a matter of contract by which a legal liability could be modified, but a matter of law by which a uniform liability was imposed." The supreme court of the United States expressed the same view in *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U. S. 27, 40 S. Ct. 69, 64 L. Ed. 118, wherein it was said: "The act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates which it was manifestly the dominant purpose of the act to regulate commerce to establish, a purpose which would be wholly destroyed if, as held by

the court below, the validity of contracts made by telegraph companies as to their interstate commerce business continued to be subjected to the control of divergent and it may be conflicting local laws." See, also, *Western Union Telegraph Co. v. Priester,* 276 U. S. 252, 48 S. Ct. 234, 72 L. Ed. 555. We therefore conclude that the instant case comes within the field occupied by the congress of the United States and that a proper conclusion can be reached only by the application of rules of law announced by the federal courts.

The rule appears to be well settled in the federal courts that pain and suffering and mental anguish are too vague for legal redress where no injury is done to person, property, health or reputation. *Southern Express Co. v. Byers,* 240 U. S. 612, 36 S. Ct. 410, 60 L. Ed. 825; *Western Union Telegraph Co. v. Speight,* 254 U. S. 17, 41 S. Ct. 11, 65 L. Ed. 104; *Western Union Telegraph Co. v. Lee,* 174 Ky. 210, 192 S. W. 70. In the latter case, the court said: "But before Congress took control of the subject of interstate telegrams, state laws could incidentally affect them; since the act of 1910, they cannot. The whole subject of interstate telegrams, including the terms of the contract and the character of the recovery, are now controlled by the federal law; and, as above shown, Lee's telegram was an interstate telegram. It follows, therefore, that the circuit court erred in sustaining the demurrers to the answer which sought to limit the company's liability under the contract, and in permitting a recovery for mental anguish."

Other cases in point are *Ey v. Western Union Telegraph & Cable Co.,* 298 Fed. 357; *Jones v. Western Union Telegraph Co.,* 233 Fed. 301; *Mees v. Western Union Telegraph Co.,* 55 Fed. (2d) 691.

We conclude therefore that a recovery cannot be had for mental pain and anguish under the applicable rules announced by the federal courts.

The trial court correctly directed a verdict for the defendant and dismissed the action.

AFFIRMED.

CLYDE D. MACOMBER V. STATE OF NEBRASKA.
291 N. W. 674

FILED APRIL 12, 1940. No. 30473.

1. **Statutes.** Penal statutes are inelastic and must be strictly construed, and may not be extended by implication.
2. **Kidnaping.** Strictly construing section 28-417, Comp. St. 1929, a guide to the meaning of the statute is found in the evil which it is designed to remedy, and it is the duty of the court to review the contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body at the time of the enactment of the statute.
3. **Statutes.** When a statute is required to be construed strictly, such statute should have a sensible construction. The general terms contained therein should be so limited in their construction as not to lead to injustice, oppression or an absurd consequence.
4. ———. In a strict construction of a penal statute, it is presumed that the legislature intended exceptions to its language which would avoid results of injustice, oppression or an absurd consequence. The reason of the law in such case prevails over its letter.
5. **Kidnaping.** Section 28-417, Comp. St. 1929, is not all-inclusive, to cover several other offenses provided for by different sections of the Criminal Code, and warrants the strict construction that the legislature did not so intend such statute at the time of its enactment.
6. ———. The evidence in the instant case, examined and considered in its entirety, fails to prove beyond a reasonable doubt the crime of kidnaping, within the meaning of the language used in and contemplated by section 28-417, Comp. St. 1929.
7. **Criminal Law.** Section 20-1207, Comp. St. 1929, subjecting a witness to a physical examination, to be offered with reference to his physical or mental condition or the alleged cause thereof, applies only to parties to an action.
8. ———. "A conviction of a lesser offense than that for which the accused was informed against is not a bar to a prosecution for a greater offense if the accused is granted a new trial." *Pembrook v. State*, 119 Neb. 417, 229 N. W. 271.

ERROR to the district court for Lincoln county: ISAAC J. NISLEY, JUDGE. *Reversed.*

Hoagland, Carr & Hoagland, Beeler, Crosby & Baskins and *Robert B. Crosby*, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Milton C. Murphy, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

The defendant, Clyde D. Macomber, was charged in the district court for Lincoln county, with Albert A. Hastings and Joseph R. Baskins, with robbing Sam I. Pappas of $275 (this count was dismissed); with unlawful assault, with intent to inflict great bodily harm, on Sam I. Pappas, resulting in the conviction of defendant Macomber of assault and battery, for which he was sentenced to 60 days in jail; and in count one of the information with the crime of kidnaping. The language constituting this charge is substantially as follows:

Albert A. Hastings, Clyde D. Macomber and Joseph R. Baskins (late of Lincoln county), on or about November 21, 1937, did unlawfully and feloniously carry off, decoy, entice away, secrete and imprison Sam I. Pappas for the purpose of compelling Sam I. Pappas, forcibly and against his will, to confess and admit that he had committed the crime of sodomy. The maximum penalty for sodomy, under section 28-920, Comp. St. 1929, is 20 years in the penitentiary. Macomber was convicted of kidnaping, and, upon the overruling of the motion for a new trial, sentenced to serve the remainder of his natural life in the penitentiary. As plaintiff in error, he presents to this court for review the record of his conviction. The record contains 107 assignments of error and nearly 2,000 pages of other matter.

Plaintiff in error contends that the verdict of the jury finding defendant Macomber guilty of kidnaping is contrary to the evidence and the law. The record discloses:

On the evening of November 13, 1937, Glenn Hardenbrook, a boy 17 years of age, was caught in the act of committing the crime of sodomy with another young boy at the Union Pacific depot in North Platte. An arrest was made by police officers Westphal, Lindekugel and Macomber. The

Hardenbrook boy was taken to the city police station and subsequently questioned with reference to becoming a moral pervert. It developed that he had first been taught by a man in Denver and later had such relations with one Sam Pappas, employed in a restaurant and known as "Coney Island" Sam Pappas. Hardenbrook remained in the city jail, and on Saturday evening, November 20, 1937, he talked to Albert A. Hastings, a defendant, who conducted an insurance and loan business in North Platte and who was active in city politics. His presence at the police station was accounted for in that he had been called by Officer Lindekugel on November 17, 1937, and learned about the case from such officer and from Amiel Traub, desk sergeant. The record discloses an offer to prove, as part of the defense, that one of the police officers had talked to the county attorney, and it was suggested by the latter that Hastings had become interested in procuring evidence in the case. It is shown in the record that a conversation was had between Hastings and the county attorney in the latter's office "about ways and means of clearing up this case, about the parties that had been getting this boy started, and I (the county attorney) mentioned the fact if Al Hastings heard about this he would probably like to work on the case, he had been trying to get the Greek for so long." The county attorney denied making any statement to Officer Traub about contacting Hastings to get him to assist. The substance of the county attorney's testimony, with respect to Hastings participating in the case, is: "Hastings had volunteered himself into the case, I could not very well, whether I wanted him in or not, tell him not to go ahead with the case."

On Saturday morning Hastings contacted Louis Kelly, a newspaper man, and asked him if he wanted a good story. Kelly and Hastings met the Hardenbrook boy in the office of the police judge Saturday night. Hastings introduced himself to the boy and told him he wanted to help the officers and other boys and informed him of the seriousness of the crime. He agreed to help the boy, but not in a finan-

cial way. Hardenbrook testified that Hastings told him he could get a parole and benefit financially. A trap was then set to catch Sam Pappas; Hastings, Kelly and Lindekugel to be witnesses. The Hardenbrook boy was to contact Sam Pappas and induce him to go to a rooming house and have relations with him. There they were to be caught in the commission of the crime. This scheme failed.

By way of explanation, there are two persons in North Platte, each connected in some manner with the restaurant business, by the name of Sam Pappas: Sam A. Pappas, known as "Coney Island" Sam Pappas, and Sam I. Pappas, the proprietor and owner of the Union cigar store and restaurant, who was also known as a local gambler, who had permitted card playing for money in his cigar store. The defendant Hastings, as well as the police officers and others, claimed to know only one Sam Pappas; that is, Sam I. Pappas. Hastings knew Sam A. Pappas as "Tom," and Sam A. Pappas testified that Hastings always referred to him as "Tom." The fact that Tom Gladdis was employed with Sam A. Pappas might have led to the confusion in distinguishing the two men.

Defendant Macomber, 26 years of age, was employed by the city in the capacity of a regular patrolman. He worked four hours in the afternoon and four hours at night, until midnight. He was the driver of the cruiser car, answered red lights and patroled alleys and streets. He drove the cruiser at the time the Hardenbrook boy was apprehended, and testified that Hardenbrook told him at the police station that he had committed the crime of sodomy with one Sam Pappas, who operated a restaurant, and with his brother Gus. Sam I. Pappas also had a brother named Gus, who managed the Union restaurant, while he, Sam I., managed the Union cigar store. Macomber knew only one Pappas and that was Sam I. Pappas. Macomber saw Albert A. Hastings at the police station on the night of November 19, 1937, and he claimed to have had a conversation on the street the morning of November 20 with the county attorney, who is purported to have told him to engage Sam Pap-

pas in conversation and to attempt to have him, Pappas, commit the crime of sodomy with him, Macomber; also to procure two witnesses. All of such testimony is in conflict and rebutted. Macomber testified that he saw Sam I. Pappas at about 8 o'clock in the evening of November 21, and induced him to ride with him in the police cruiser; that during the course of the ride Macomber suggested to Pappas that he, at some future date, indulge in sodomous relations with him, to which he claimed Pappas assented. Sam I. Pappas and witnesses for the state are far from being in accord on this testimony.

On the day in question Sam I. Pappas had dinner at the beet farm which he owned, a few miles distant from North Platte. Later in the day he went to the funeral of a friend in town and stopped at the Union café and had coffee, later returning to the farm. Mrs. Anna Simek, a sister-in-law of Sam I. Pappas, with whom he lived, testified that early in the evening Macomber knocked on a window in her home; she went to the door, and Macomber asked to see Sam, and, when informed he was not at home, told her that when he returned to put a light on in the house and tell Sam that the boys wanted to see him about a card game and wanted to tell him something "for his own good." Later in the evening Sam returned home and had been there a short time when Macomber appeared, about 11:30 o'clock, met Sam and asked him to come along, and Pappas readily consented. Baskins, a city councilman and chairman of the police commission, was seated in the car. It had been his habit to ride evenings in the cruiser, and on this evening he was picked up by Macomber. At this time they all greeted each other pleasantly. Macomber asked Pappas if he was armed; he replied that he was not and never carried a gun. After getting into the car, they drove around for a short time, then stopped at the Ritner Hotel where Macomber lived, occupying room 25. The three men went into the lobby of the hotel together and up a stairway to the first landing, where Macomber called a night clerk and told him to take Baskins and Pappas up to his room and

stay there until he returned. Macomber then left to use the telephone in the lobby and was heard to call Hastings' residence. Finally Hastings appeared, and he and Macomber went up to room 25, and the clerk left. When they entered the room Hastings slipped the bolt on the door, and said "Hello" to both Baskins and Pappas and shook hands with them. This evidence is in conflict. The defendant's witnesses testified that the door was at all times ajar. Finally, Macomber asked Pappas to tell Baskins and Hastings what Pappas wanted to do to him. Pappas is purported to have replied, in substance, that he might have been only fooling, and Macomber stated he knew he was not fooling. Macomber threatened to arrest him and take him to jail; Pappas replied: "There wasn't enough cops on the force to take him." Pappas then attempted to get away and struck Macomber. The exact conversations that took place in the room are at a variance. The version of Pappas is as follows:

After they were seated in the room Macomber said: "Sam, do you know what we got you up here for?" Pappas replied, "No." Macomber said: "You tell us what you done with that boy." Pappas replied that he did not know what Macomber was talking about. Macomber disputed him; Pappas replied: "You are talking to the wrong man altogether, * * * I don't know what you are talking about. * * * If you fellows think I have done something, take me down to the police station or the sheriff's office and I will tell you if I know something." Hastings said: "Come on now cough up." Macomber said: "You are getting smart are you? * * * You had better talk." Pappas replied that he was not going to talk, and Macomber said: "I am going to make you talk." Pappas replied: "If you think you can, hop to it; go ahead." Then Macomber struck him.

Hastings' version of the conversation between Macomber and Pappas is substantially the same as Macomber's; that Macomber told Pappas that he was under arrest and he could go to the police station, but that Pappas replied that if he went to the police station he would go with the sheriff;

that there were not enough policemen on the force to take him. Macomber stated he could take him. Pappas then called Macomber a liar, Macomber got up, Pappas got up and struck at Macomber's mouth and nose; Macomber then struck Pappas, and a fight ensued. Baskins' version of the conversation corroborates both Macomber and Hastings. Pappas claimed that Hastings and Baskins held his arms; that Hastings lost his hold on his arm and held Pappas by his clothing; that Macomber, using vile language, informed Pappas: "You * * * Greeks aint going to run this town, the white people are going to run this town." This language was heard by a guest at the hotel in an adjoining room. He heard the commotion and heard the statement, purported to have been made by Macomber to Pappas, to "sit down * * * I am running this thing." He also heard this language: "Don't hold me, Curley, don't hit me again." With reference to the order to "sit down," the witness heard Pappas say: "I will, I will sit down, I will." He stated that the commotion lasted five or ten minutes.

Pappas testified that Macomber kept striking him in and about the face and head; he did not remember striking Macomber but was attempting to get away. Finally, he did get outside of the room and was standing up against the wall, being pounded by Macomber. There is evidence that Pappas was up against the side of the wall, with his hands down at his side, and his knees sagging, and that he kept saying "all right;" that Macomber kept pounding Pappas with his fists. There is also evidence that Hastings came out into the hall, and that he said: " 'Chet, Chet,' in a serious, cautious way," cautioning him that he was being observed, and that Macomber, after he was warned, "kept on punching; he said, 'I am doing this, I am handling this.' " When Pappas made the attempt to escape from the room, he was apparently dragged back into the room and told to sit down. The striking of Pappas in the hall is testified to by one witness, who also stated he saw Baskins in the hall; that Baskins merely shook his head, did not say anything, and returned to the room.

The testimony for the defense is that Pappas, in attempting to retreat from the room, tripped on the carpet, and that the injuries sustained to his head were caused by his falling against a radiator. The location of bloodstains, of the furniture, and of the radiator in the hall is all detailed extensively in the record and will not be here reviewed. The testimony as to the time actually spent in the room is at variance, the defendant and his witnesses claiming that it did not exceed two minutes.

Finally, the men went downstairs. Pappas was bleeding profusely and wiping blood from his nose and other parts of his head with a handkerchief. He asked to be able to "wash up" but was prevented from doing so. Here, again, the evidence is in conflict as to whether Macomber made a statement that he was the "boss" and was going to take Pappas to jail; whether he struck and pushed Pappas and demanded that he get into the back seat of the cruiser with Hastings, or whether Pappas went voluntarily. When the men arrived at the city jail the Hardenbrook boy was brought out. It is claimed, and denied, that Hastings, Baskins and Macomber remarked to him: "This is the man, this is Sam Pappas," to which the boy replied that Sam I. Pappas was not the man; that it was "a different man altogether, Sam Pappas works in the Coney Island." Macomber and Hardenbrook went for "Coney Island" Sam and returned with him, and the boy stated that he was the man. Then it was suggested by Macomber that he should have a warrant for Sam I. Pappas for resisting an officer, and also for the offense of sodomy based on Macomber's statement, and Hastings said it would be all right for both of the boys to go, meaning Sam A. and Sam I. Pappas; that they would come when they were wanted, and it was suggested that Sam I. Pappas and Macomber shake hands and forget all about the incident. Officer Traub testified that Macomber shook hands with Pappas and "patted him on the shoulder," and he was sent home free, without any police record against him; that while at the police station Pappas said: "Hastings and Baskins treated him like a gentleman," and that Officer Macomber was only doing his duty.

When Sam I. Pappas arrived home, Mrs. Semik awakened her two daughters. They, with Pappas, contacted the sheriff and then went immediately to the hospital, where Pappas remained for eight or nine days. The injuries sustained by him as the result of the assault, and as testified to by the examining physician, may be summarized as follows: Face badly bruised; eyes swollen shut; deep cut, with ragged edges, an inch long over the left eye; slighter cut over same eye; nose skinned; lip cut on right side; inside of cheek bruised on upper right side; lacerations close to the lips; right side of face puffed with air, passing under the tissues and extending over the entire side of head and face to margin of collarbone; portion of air breathed passed through torn tissues under the skin, over the side of the face and neck; lachrymal bone fractured; whites of both eyes red; bump on head back of ear; stitches required to close wounds.

Macomber testified that he at no time struck Pappas with his closed fist. The assault on Pappas, as shown by all of the testimony, was brutal, unwarranted and unnecessary. Throughout the record the insinuation is prominent that Hastings, with the use of his political influence, desired to have charge of the community, and purposely, and in conspiracy with others, sought to drive Sam I. Pappas out of the gambling business and perhaps out of the city for his, Hastings', own personal aggrandizement. We here concern ourselves with the part this defendant played in the case. The use of the third degree, applied by police officers to persons in their custody, can never be tolerated, and confessions obtained thereby are necessarily invalidated because of the nature of the means employed to obtain them. This practice has been condemned by nearly all of the courts, and courts generally are in agreement on this subject. See *Stagemeyer v. State*, 133 Neb. 9, 273 N. W. 824.

That this plaintiff in error was guilty of conduct which richly deserves the condemnation of all good people is not to be denied, but the question for us to decide, and for the state to prove beyond a reasonable doubt, is whether de-

fendant Macomber kidnaped Sam I. Pappas, in violation of the strict terms of the statute and as charged in the information.

"In this state all public offenses are statutory; no act is criminal unless the legislature has in express terms declared it to be so; and no person can be punished for any act or omission which is not made penal by the plain import of the written law." *Lane v. State,* 120 Neb. 302, 232 N. W. 96. See, also, *State v. De Wolfe,* 67 Neb. 321, 93 N. W. 746; *State v. Pielsticker,* 118 Neb. 419, 225 N. W. 51. "It is elementary that penal statutes are inelastic and must be strictly construed. They are never extended by implication." *Weber v. State,* 122 Neb. 369, 240 N. W. 429; *Preston v. State,* 106 Neb. 848, 184 N. W. 925. See also section 29-106, Comp. St. 1929. The foregoing Nebraska cases definitely determine the manner of construing the provisions of criminal statutes in this state.

Section 28-417, Comp. St. 1929, in its entirety, contains possibly four separate divisions that may be stated as follows: First: "Whoever shall kidnap or forcibly or fraudulently carry off or decoy out of this state any person or persons or shall arrest or imprison any person or persons, with the intention of having such person or persons carried out of the state, unless it be in pursuance of the laws thereof, shall be confined in the penitentiary not less than three nor more than seven years." This part of the statute,—take by force and carry off any person into another state for the purpose of imprisonment,—carries a penalty of not to exceed seven nor less than three years. The second provision of this section of the statute is: "Whoever shall unlawfully carry off or decoy, entice away, secrete or imprison any person, for the purpose of extorting from such person or from his or her relatives or friends any money, * * * or for the purpose of compelling the performance of any act by such person," shall be imprisoned in the penitentiary for and during the period of his natural life. The third provision, carrying the same language as the second, contains the further statement, "in furtherance of any such purpose,

do or threaten to do any injury to the person so carried off," etc., shall be imprisoned in the penitentiary for the period of his natural life. The fourth part of said section provides: "Whoever shall threaten to carry off, entice away, secrete or imprison any person for the purpose of extorting money from such person, or from his or her relatives or friends," shall be imprisoned in the penitentiary for not less than one nor more than 20 years.

The dominating element of the offense of kidnaping is the intent with which the acts enumerated in the statute are done. The purpose of the enactment of statutes prohibiting kidnaping is to secure the personal liberty of citizens, to protect the custody of parents or guardians, or other persons having lawful custody of children, also the children. The present statute (Comp. St. 1929, sec. 28-417) was passed in this state immediately after the kidnaping of young Edward Cudahy, where the kidnapers sought ransom for the return of the boy. We find no case that is of direct assistance in determining the adaptability of the facts in the instant case to section 28-417, *supra*. It is apparent that when the legislature enacted section 28-417 it had in mind the unlawful carrying away, decoying, enticing, or imprisoning of any person for the purpose of extorting from such person, relatives or friends any money, property or promise, and for the purpose of compelling the performance of any act by such person.

The state's contention is that the taking of Pappas in an effort to procure a confession, or in an effort to get him to confess to the crime of sodomy, was sufficient when any force was used upon him in that connection. The word "purpose" means that which one sets before him to accomplish. To "compel," within the contemplation of section 28-417, *supra*, means to force; and "performance" means, as the term implies, such other fulfilment of a duty as puts an end to obligation by leaving nothing to be done. While there is apparently great force in the reasoning in the state's brief, we do not believe that the legislature intended, considering the history of the enactment of this

law and the reason therefor, to include a state of facts as exists in the instant case within the section of the statute herein discussed.

In *Holy Trinity Church v. United States,* 143 U. S. 457, 12 S. Ct. 511, it was said: "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. * * * This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act." And on page 463 we find this language: "Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body." Citing *United States v. Union P. R. Co.,* 91 U. S. 72, 79. In the latter case it was said: "But courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it. *Aldridge v. Williams,* 3 How. 24; *Preston v. Browder,* 1 Wheat. 120."

In *State v. Clark,* 29 N. J. Law, 96, the court said: "If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity. The court must restrain the words. The object designed to be reached by the act must limit and control the literal import of the terms and phrases employed. 1 Kent's Com. 462; *Commonwealth v. Kimball,* 24 Pick. 370; *United States v. Fisher,* 2 Cranch, 400; 1 Bl. Com. 60." And in *United States v. Kirby,* 7 Wall. (U. S.) 482, it was said: "All laws should receive a sensible construction. General terms should

be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter." The circumstances under which the statute in question was passed and the purposes to be accomplished by it, in its scope and effect, are inconsistent with the position taken by the state.

It would seem apparent that section 28-417, Comp. St. 1929, is not all-inclusive; that is, to cover other offenses provided for by different sections of the statute, and the application of its provisions to the facts in the case at bar meets this objection raised by the plaintiff in error. With the severity of the penalty we are not concerned, and we acknowledge that it is privileged only to the legislature; but the intent of the legislature in enacting section 28-417 is of immediate concern, and it does not contemplate the crime of kidnaping, considered in the light of the facts in the instant case.

The only case to reach this court since the enactment of section 28-417, *supra,* is *Brown v. State,* 111 Neb. 486, 196 N. W. 926. Both plaintiff in error and the state cite this case as sustaining their respective contentions. Briefly, the facts are these: Brown picked up two young women; they requested that he let them off at Krug Park. He intentionally took them several miles beyond Krug Park to his shack; there chained and imprisoned them in a hole, four feet deep, six feet long, and two feet wide, for the purpose of compelling the women to have sexual relations with him. Under such circumstances he completed the act of sexual intercourse. He then permitted his captives to go into the attic of the shack and threatened their lives if they made an outcry. They saw a person passing nearby, made an outcry and pursuit of Brown followed. He was apprehended, charged with and convicted of kidnaping under section 28-417, Comp. St. 1929. It is noted that Brown, by his act, completed every necessary element of the offense charged

under said section of the statute. Again referring to the statute, it indicates clearly that the person perpetrating the act has the commission of a crime or an unlawful act in mind at the time. Otherwise, this statute must of necessity catch the innocent as well as the guilty. The evidence in the instant case does not warrant the conclusion that the assault on Pappas was planned by, intended, or was within the original contemplation of, Macomber, on duty and fully uniformed as a police officer, at the time he asked Pappas to accompany him and later took him to the Ritner Hotel. What Macomber intended was to give Pappas the third degree and endeavor to have him confess to the crime of sodomy in the presence of two witnesses, Baskins and Hastings. It is claimed that his reward would be the enhancement of his prestige in clearing up this offense and have a tendency to advance him in the police service of the city. The evidence does not warrant the conclusion that when the men entered the hotel room they intended to detain and assault Pappas until such time as they finally forced a confession to the crime of sodomy. Pappas voluntarily stayed in the room for some period of time when he would have been privileged to leave. He finally escaped from the room, was free for a time in the lobby of the hotel, accompanied the men to the police station, and there he was released and returned home.

For the reasons given, we conclude that the charge of kidnaping should not have been submitted to the jury, and in its submission the trial court erred.

With reference to the assignment of error as to compelling the complaining witness, Sam I. Pappas, to submit to a puncture of his spine, fluid to be taken therefrom and subjected to a chemical analysis for the purpose of determining the extent of the effect and the ravages of the disease of syphilis on his nervous system, and as affecting his sight and hearing, examination was permitted by the court and was made, with the exception of the spinal test. The physician said that the examination was not complete without such a test and that it would be harmless. Pappas

refused to submit to the test. A request was made to the court to compel him to so submit. Then the evidence discloses the history of the syphilis suffered by him, as found by the Mayo Clinic, and that Pappas did not object to its use. The contention of the defendant is that he was entitled to prove by a spinal test that the defects in the eyesight and hearing were caused by the disease and not by the assault, on the theory that, when plaintiff in error offered evidence as to the physical or mental condition of Pappas, section 20-1207, Comp. St. 1929, applied.

The trial court, under the prevailing rule, has the power to require the plaintiff in a personal injury action to undergo a physical examination at the request of the defendant. Such right on defendant's part is not considered absolute, and the matter is within the discretion of the trial court when such discretion is free from palpable abuse. See *Ziskovsky v. Miller*, 120 Neb. 255, 231 N. W. 809.

We next refer to the charge of assault with intent to inflict great bodily harm, which resulted in a conviction of assault and battery against the defendant. This court in *Pembrook v. State*, 119 Neb. 417, 229 N. W. 271, said: "The precise question is whether a conviction of a lesser offense than that for which the accused was informed against is a bar to further prosecution for the greater offense if the accused is granted a new trial. Nebraska is committed to the position that the defendant cannot benefit by the verdict of the jury, if he chooses to appeal from it." This court held: "A conviction of a lesser offense than that for which the accused was informed against is not a bar to a prosecution for a greater offense if the accused is granted a new trial." See, also, *Clarence v. State*, 89 Neb. 762, 132 N. W. 395. The fact that the above cases are homicide cases does not alter the principle of law, in so far as it affects the subject-matter of the count, in the instant case, of assault with intent to inflict great bodily harm, and incorporated therein assault and battery.

Other assignments of error need not be discussed in view of our holding. Upon a retrial of this case, we believe the

court will correct such errors that may be apparent, and that defendant will have a fair and impartial trial.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

ROSE, J., dissenting.

The information was in proper form and accused defendant of violating the kidnaping law, which provides that whoever unlawfully entices away, secretes or imprisons any person for the purpose of compelling the performance of any act by such person, is, upon conviction, punishable for kidnaping by imprisonment for life. Comp. St. 1929, sec. 28-417.

When this law was enacted, contemporaneous history showed that the art of kidnaping had progressed to the point where a helpless victim was tortured by the threat his eyes would be gouged out if he failed to write and sign a letter containing the threat and address it to parent, brother, sister or other relative. The law was intended to protect the victim, his relatives and the public generally. The penalty for kidnaping was adapted to the atrocity of the crime.

In this prosecution competent evidence proves beyond a reasonable doubt the following facts or proper inferences therefrom as found by the jury in their verdict of guilty: The three defendants named in the information, Macomber, a policeman of North Platte, Baskins, a member of the city council, and Hastings, a boss in city politics, conspired together to compel Sam I. Pappas, who had been permitted by them to operate a gambling den, to confess to a felony of which he was innocent—a confession which, if made, might subject him to imprisonment in the penitentiary for 20 years and perhaps for life. The motive for the purpose to compel the confession was to get rid of Pappas and procure profits from gambling. Macomber and Baskins drove to the home of Pappas in a police cruiser not long before midnight, Sunday, November 21, 1937. Macomber intimated that something for the good of Pappas was con-

templated and the latter readily consented to leave home in the cruiser with the city officials. He had not been accused of any offense and there had been no warrant for his arrest. He was not told he was under arrest. He was taken to Macomber's room 25, in the Ritner Hotel, without knowledge of what was in store for him there. Hastings was promptly called to the hotel by telephone and, while the four men, Macomber, Baskins, Hastings and Pappas, were in room 25, with the door closed and bolted on the inside, Macomber made a demand on Pappas to confess his guilt of a lawless act of degeneracy. The latter asserted his innocence and refused to confess. Threats to make him do so were loud and profane. To compel such a confession Baskins and Hastings held Pappas while Macomber beat him. Pappas tried to escape, unbolted the door and got into the hall outside, was beaten there, dragged back into the room where the beating was continued. These inhuman atrocities did not compel Pappas to confess guilt. After the beating and turmoil ceased in room 25 with the departure of the four occupants, there was blood on the walls, on the floor, on a rug in front of the bed, on the bedspread, on the drapes, on the walls of the hall and on the radiator. Physical injuries inflicted on Pappas as described by an examining physician and as related in the majority opinion were:

"Face badly bruised; eyes swollen shut; deep cut, with ragged edges, an inch long over the left eye; slighter cut over same eye; nose skinned; lip cut on right side; inside of cheek bruised on upper right side; lacerations close to the lips; right side of face puffed with air passing under the tissues and extending over the entire side of head and face to margin of collarbone; portion of air breathed passed through torn tissues under the skin, over the side of the face and neck; lachrymal bone fractured; whites of both eyes red; bump on head back of ear; stitches required to close wounds."

Unsteady on his legs, his face smeared with gore, Pappas was denied the privilege of washing away the blood and in that condition was taken to the police station and

confronted with the pervert who was asked to identify him as a companion in criminal depravity. The identification was refused. Pappas was not the guilty man. He was released, taken home and to the hospital without being accused of any violation of law.

The defense that what occurred in room 25 was a fist fight started by Pappas is too preposterous for belief and the jury wisely disregard testimony in support of it. Macomber at the time was a police officer in uniform and was armed. He was assisted by Baskins, a member of the city council, and by Hastings, a political boss who gave orders to police officers at the police station—orders that were obeyed. Pappas was known in advance to be unarmed. His eyesight was impaired and he was weakened by a disease of long standing. He was imprisoned by these enemies of law and order and was helpless in their presence. Officialdom and bossism gave them no immunity from their lawlessness. In legal conduct of public duty officers of the law are not in danger of prosecution for kidnaping. The facts narrated and the necessary inferences therefrom were clearly shown beyond reasonable doubt by competent evidence which the jury believed.

My understanding of the facts and the law is that the state in the prosecution of Macomber proved beyond a reasonable doubt every element of kidnaping as defined by statute—enticing Pappas away from home, transporting him to room 25 in the Ritner Hotel, imprisoning him therein and beating him in the manner indicated for the purpose of compelling him against his will to confess guilt of a felony. Each of these acts was unlawful and all together with criminal intent amounted to kidnaping. Such a confession, if compelled, would have been an "act" within the meaning of that word as used in the kidnaping statute. Pappas evidently preferred death to the making of such a confession. The accomplishment of the unlawful purpose of Macomber to compel a confession was not necessary to a conviction. On the issue of felonious purpose or intent in a criminal prosecution, an adult sane person may be presumed

to intend the natural and probable consequences of his voluntary acts. Criminal intent or felonious purpose was proved by circumstances and acts of accused in furtherance of the felony charged. The length of time kidnapers detain or imprison their victim, forcibly and against his will, is immaterial in a prosecution for kidnaping.

The kidnaping statute is in plain, unambiguous language and needs no construction. I do not agree with the majority that enforcement of the kidnaping statute according to its literal terms led to injustice, oppression or absurdity invalidating the conviction. I examined the entire record with care and I did not find any error in the proceedings below or in the sentence of the district court to justify the acquittal of Macomber on the charge of kidnaping.

EARL CONRAD ET AL., APPELLANTS, V. WILLIAM C. KAUP, APPELLEE.

291 N. W. 687

FILED APRIL 19, 1940. No. 30810.

1. **Injunction.** An injunction is a command to refrain from a particular act.
2. ———. The remedy by ordinary injunction is wholly preventive, prohibitory, or protective.
3. ———. "Since the purpose of an injunction is not to afford a remedy for what is past but to prevent future mischief, not being used for the purpose of punishment or to compel persons to do right but merely to prevent them from doing wrong, rights already lost and wrongs already perpetrated cannot be corrected by injunction." 32 C. J. 45.
4. **Action.** The relief ordinarily granted in equity is such as the nature of the case, the law, and the facts demand, not at the beginning of the litigation, but at the time the decree is entered.
5. ———. Courts are not required to issue useless orders or enter futile decrees.

APPEAL from the district court for Cuming county: ADOLPH E. WENKE, JUDGE. *Affirmed.*

Robins & Yost, for appellants.

John J. Gross, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

SIMMONS, C. J.

In this action, plaintiffs sought to enjoin the defendant from engaging in the seed business within the trade territory of West Point, Nebraska. Plaintiffs' action is founded on a written instrument, dated December 18, 1937, expiring November 1, 1938. Plaintiffs are in the wholesale and retail seed business. The contract related to the sale of seeds produced or marketed by the plaintiffs. The contract, among other clauses, provided: "Upon termination of this agreement, second party (defendant) agrees that he will not engage in the sale of, nor solicit for, the sale of any other seeds, either directly or indirectly, except that of Yager Seed Co. (plaintiffs) anywhere within the trade territory of first party (plaintiffs), within one year from the date of termination of this agreement."

Plaintiffs filed their petition herein on March 15, 1939, alleging a breach of the contract by the defendant, and praying that defendant be enjoined "from either directly or indirectly engaging in the sale of or soliciting for sale of seeds other than the seeds of Yager Seed Company anywhere within the trade territory of and within the vicinity of West Point, Nebraska, under the terms of the contract * * * up to and including the first day of November, 1939; that a temporary injunction issue herein, and that the plaintiffs have such other relief as may be just and equitable, including the costs and damages herein." April 18, 1939, defendant filed a demurrer. It was overruled May 3, 1939. At the same time, the trial court denied a temporary injunction. The defendant answered May 20, 1939. The case was heard June 5, 1939. At the close of plaintiffs' case in chief, defendant moved that the cause be dismissed for the reason that the pleadings and the evidence were insufficient to entitle plaintiffs to the relief prayed for in their petition. The motion was sustained, and the action dis-

missed. August 21, 1939, plaintiffs filed a notice of appeal to this court. The transcript and bill of exceptions were filed herein on September 2, 1939. Based on a stipulation of the parties, defendant's brief day was extended and his brief filed herein on November 4, 1939. The case was submitted to this court by oral argument on March 7, 1940.

By the provisions of section 20-1925, Comp. St. 1929, this matter is before this court for trial *de novo*. An injunction is a command to refrain from a particular act. Comp. St. 1929, sec. 20-1062. The remedy by ordinary injunction is wholly preventive, prohibitory, or protective. 4 Pomeroy, Equity Jurisprudence (4th ed.) 3206, sec. 1337. "Since the purpose of an injunction is not to afford a remedy for what is past but to prevent future mischief, not being used for the purpose of punishment or to compel persons to do right but merely to prevent them from doing wrong, rights already lost and wrongs already perpetrated cannot be corrected by injunction." 32 C. J. 45. See *Bishop v. Huff*, 81 Neb. 729, 116 N. W. 665; *Vogel v. Rawley*, 85 Neb 600, 123 N. W. 1037. We do not decide the merits of plaintiffs' case.

From an examination of plaintiffs' petition, the prayer thereof, and the evidence offered, it is obvious that the only relief this court could afford, were we so disposed, would be to enjoin the defendant from doing the acts complained of "up to and including the first day of November, 1939." Under the conditions here existing, we are called upon to determine the rights of the parties existing at the time of the determination of the suit in this court. 21 C. J. 663; 19 Am. Jur. 283, sec. 411; 19 Am. Jur. 50, sec. 21; 14 R. C. L. 308, sec. 6.

The relief ordinarily granted in equity is such as the nature of the case, the law, and the facts demand, not at the beginning of the litigation, but at the time the decree is entered. *Superior Oil & Gas Co. v. Mehlin*, 25 Okla. 809, 108 Pac. 545; *Randel v. Brown*, 2 How. (U. S.) 405; *McCormick v. Oklahoma City*, 203 Fed. 921; *Hanscom v. Malden & Melrose Gas Light Co.*, 220 Mass. 1, 107 N. E.

426; *Baker v. Salzenstein*, 314 Ill. 226, 145 N. E. 355; *Hale v. Jenkins*, 55 Misc. 119, 106 N. Y. Supp. 282; *Brown v. Cole*, 105 N. Y. Supp. 196; *Alsager v. Peterson*, 31 S. Dak. 452, 141 N. W. 391.

"When, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for the appellate court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief, the court will not proceed to a formal judgment, but will dismiss the appeal." *Mills v. Green*, 159 U. S. 651, 16 S. Ct. 132. See *Tennessee v. Condon*, 189 U. S. 64, 23 S. Ct. 579.

Courts are not required to issue useless orders or enter futile decrees.

Plaintiffs' petition is dismissed at their costs.

AFFIRMED.

ERMA A. PRINGLE, APPELLEE, V. ARTHUR L. SMITH ET AL., APPELLANTS.
291 N. W. 673

FILED APRIL 19, 1940. No. 30820.

Mortgages. "Mere inadequacy of price in a sale under foreclosure will not justify a court in refusing a confirmation, unless such inadequacy is so great as to shock the conscience of the court or to amount to evidence of fraud." *Lemere v. White*, 122 Neb. 676, 241 N. W. 105.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Paul W. White, for appellants.

Sterling F. Mutz, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

EBERLY, J.

This is a suit in equity in which Erma A. Pringle is plaintiff and Arthur L. Smith and Bertha L. Smith, his wife, are

defendants. It involves the enforcement of a contract of sale of certain real estate in the city of Lincoln, after admitted default in its terms on part of the defendants. In this appeal, the defendants challenge the correctness of the ruling of the trial court overruling their objections to a public sale of the premises involved, made May 23, 1939, pursuant to the decree entered in said cause, to Erma A. Pringle for the sum of $15,000, and also to the confirmation thereof by such court. It appears that this bid was subject to unpaid taxes on the property. Defendants' objections are based wholly on the inadequacy of the sale price.

The following is a summary of appellants' evidence by experts on the subject of value, viz.: Lawrence F. Farrell, $22,500; John M. Alexander, $22,000; Jess Nickles, $22,500; Clarence Dixon, $22,000; Conrad Schaaf, $20,000; John J. Bogan, $22,000; W. F. Etmund, $20,000; Average appraisal, $21,571.43.

Appellee's similar evidence may be summarized as follows: E. M. Forsyth, $17,000; William F. Steele, $17,250; Harvey Rathbone, $17,250; Average appraisal, $17,166.67.

In addition, the record discloses two public sales, properly conducted, at which the highest bid was $15,000 (subject to unpaid taxes). There is no evidence in the record that would support the conclusion that a third sale would secure a greater price than that bid at the second sale. The amount bid at this sale, under the circumstances set forth in this record, is competent evidence of value. *Douglass v. Hill*, 29 Kan. 527.

Under all the evidence presented, the action of the district court for Lancaster county was clearly correct. No possibility of fraud exists. The facts involved are clearly within the rule this court has often announced that mere inadequacy of price in a foreclosure sale will not warrant the court's refusing a confirmation, unless such inadequacy is so great as to shock the conscience of the court or to amount to evidence of fraud. *Lemere v. White*, 122 Neb. 676, 241 N. W. 105; *Wallace v. Clements*, 124 Neb. 691, 248 N. W. 58; *First Trust Co. v. Rathbone*, 132 Neb. 211, 271 N.

W. 428; *Erwin v. Brunke,* 133 Neb. 745, 277 N. W. 48; *Fox v. Nelson,* 133 Neb. 903, 277 N. W. 795; *Fremont Joint Stock Land Bank v. Satterfield,* 133 Neb. 904, 277 N. W. 797; *Conservative Savings & Loan Ass'n v. Mancuso,* 134 Neb. 779, 279 N. W. 725; *Weir v. Smith,* 135 Neb. 447, 282 N. W. 260; *Metropolitan Life Ins. Co. v. Suverkrubbe,* 135 Neb. 865, 284 N. W. 342.

The action of the district court being in all respects correct, its judgment is

AFFIRMED.

FRANK HARRIS ET AL., APPELLEES, V. W. C. HEETER, APPELLANT.
291 N. W. 721

FILED APRIL 19, 1940. No. 30772.

Judgment. A decree of foreclosure of a tax lien against unknown owners of land, rendered upon service by publication against unknown owners and the land itself, is of no effect as against the persons who were at the time in actual possession of and farming the land, and who were not made parties defendant in the action and had no notice or knowledge thereof.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed.*

Waldron & Newkirk, for appellant.

Thomas F. Hamer, George C. Holdrege and *William J. Schall, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

PAINE, J.

This is an equitable action brought by Frank Harris and Edward Harris, plaintiffs, to quiet title in them to three lots in the suburbs of Omaha. The defendant filed a cross-action, in which he sought to have the title quieted in himself as against plaintiffs. The trial court entered a decree quieting title in the plaintiffs, and defendant appeals.

The evidence discloses that these three lots are located in the bottoms in the northeast part of Omaha. The plaintiffs are truck farmers, and have lived in the neighborhood of this land for 35 years. In 1922 they purchased about 100 acres of bottom farm land lying along the Missouri river, built their home there, and have continued farming since that time. Their farm consists, in part, of blocks 18, 19, 20, 21, 22, 27, 28 and 29 in Bogg's addition to the city of Omaha. The lots involved in this suit are lots 20, 21 and 22, in block 29 in Bogg's addition to the city of Omaha. They fenced in and farmed all the ground around these lots, and farmed them too, every year from 1922 up to the present time.

The three lots are not alone inclosed by fences, but there are fences around a large field, with the nearest fence along the bank of the river, about a block and a half from these lots. No buildings of any kind have ever been erected on these three lots, so no one has ever resided on them. The plaintiffs live in a house located about one-half mile to the east of the lots in question, and prior to this suit there was nothing appearing in the record title of these lots showing any claim of title by the plaintiffs, as their sole claim of title is based upon adverse possession since 1922.

On May 13, 1929, the county of Douglas began a tax foreclosure suit under the provisions of section 77-2039 *et seq.*, Comp. St. 1929, for the foreclosure of the statutory lien for delinquent taxes for the years 1910 and prior thereto, and for all subsequent years up to and including 1927. It is understood, of course, that Douglas county included a large number of other tracts of land in addition to these three lots. In this tax lien foreclosure suit, the last record owners of these lots were made defendants. One of them, Emma C. Peterson, the last record owner of lots 21 and 22, was served personally with summons in Douglas county. Lewis J. Spitzbart, the last record owner of lot 20, was not personally served. The lots, by proper description, were made defendants, and notice was published against all persons

having or claiming any interest in any of the real estate described in the petition. The application for service by publication was made July 31, 1929, followed by order for publication, and a proof thereof. On January 20, 1930, a decree of foreclosure was entered, and on an order of sale the sheriff sold the three lots to W. C. Heeter, the defendant in the case at bar. This sheriff's sale was held May 13, 1930, the sheriff's return showing that lot 20 was bid in by W. C. Heeter for $5, and lots 21 and 22 were bid in by him for $3, and the sale was confirmed May 17, 1932. The sheriff's deed to W. C. Heeter, defendant, was dated June 13, 1932. It thus appears that the tax foreclosure proceedings were regular and complete in every particular, except as to these adverse claimants.

The plaintiffs had been in open and notorious adverse possession of the property since the year 1922, and had continuously farmed these lots with the rest of their property. They had planted sweet potatoes, sweet corn, Irish potatoes, or other crops each year on these lots, with the surrounding ground, beginning with the year 1922, and from the fact that they planted sweet potatoes in 1922 they fixed the date of their possession as beginning on April 7, 1922, and on the day of trial, April 7, 1939, Frank Harris testified that nobody had ever notified them about the lots, or tried to collect rents or anything else, although they had been in possession then for 17 years that day. It further appears that the Harris brothers had been in possession of the property for ten years and two months when the defendant, Heeter, secured his sheriff's deed on June 13, 1932.

Judge Dineen, of the district court, found generally for the Harris brothers, plaintiffs, for the reason that service in the tax foreclosure action was not had upon the Harris brothers, either by name, or by publication, or personally, and that the proceedings, so far as they were concerned, were null and void, and by reason of the open, notorious and adverse possession of the plaintiffs for more than ten years last past the title was quieted in them, and he canceled the sheriff's deed of record as against these lots.

In support of the decree entered for the plaintiffs, quieting the title in them, it is claimed that one who is in possession of real estate, and acquiring title thereto by adverse possession, is claiming title thereto within the meaning of the tax foreclosure statute, section 77-2043, Comp. St. 1929. Plaintiffs further claim that a judgment rendered on service by publication against a resident of this state on whom personal service might have been had is absolutely void. *Hassett v. Durbin,* 132 Neb. 315, 271 N. W. 867.

"A judgment foreclosing a tax lien against unknown owners of land rendered upon a citation served by publication is not binding upon persons in actual possession of the land at the time of the filing of the suit and the rendition of the judgment, but not served with citation." *Sellers v. Simpson* (1909) 115 S. W. 888 (53 Tex. Civ. App. 205). In this case the court entered a judgment affirming the lower court, and awarding title to defendants, who claimed by adverse possession against the plaintiff, who claimed under a sheriff's deed resulting from the foreclosure of a tax lien by the state. At the time of the filing of said suit, and the rendition of said judgment for taxes, all of the defendants who pleaded the statute of limitations were in actual visual possession of the parts of the land claimed by them in their several answers, and none of them were made parties to the suit.

Where claimants have continued in adverse possession of Nebraska land for over ten years, the fact that during their occupancy there was a sale and conveyance of the premises for taxes, without notice to them, does not constitute an interruption of their possession. See *Harrison v. Dolan,* (1899) 172 Mass. 395, 52 N. E. 513, in which case Justice Oliver Wendell Holmes, who was then sitting as a judge of the supreme court of Massachusetts, and wrote the opinion, said: "Adverse possession is pure matter of fact, to be interrupted only by interrupting the possessor's exclusion of adverse claimants, an abandonment of his claim, or a change in his intent."

It appears to the court that the situation in the case at

bar is adequately discussed by the text-writer, Freeman, in the following quotation: "A judgment pronounced without service of process, actual or constructive, and without the defendant's knowing that a court has been asked to adjudicate upon his rights, is regarded with such disfavor at law that a variety of motions, writs and proceedings are there provided to overthrow it; and in many courts it is at all times and upon all occasions liable to be entirely disregarded upon having its jurisdictional infirmity exposed. But proceedings in equity are peculiarly appropriate for the exposure of this infirmity. They permit of the formation of issues upon the question of service of process, and of the trial of those issues, after full opportunity has been given to those who seek to sustain as well as to those who seek to avoid the judgment. If at such trial it satisfactorily appears that the defendant was not summoned, and had no notice of the suit, a sufficient excuse is shown for his neglect to defend, and equity will not allow the judgment, if unjust, to be used against him, no matter what jurisdictional recitals it contains." 3 Freeman, Judgments (5th ed.) 2553, sec. 1228.

A careful examination of the record discloses no prejudicial error, and the decree of the lower court is hereby

AFFIRMED.

ANNA BETHSCHEIDER, APPELLANT, V. CITY OF HEBRON, APPELLEE.

291 N. W. 684

FILED APRIL 19, 1940. No. 30742.

1. **Municipal Corporations.** Section 17-582, Comp. St. 1929, construed. *Held*: The primary purpose of the statute is to afford to the municipal authorities prompt notice of the accident and injury (as distinguished from mere notice of the defect) in order that the public officials may have an opportunity to make an investigation of the facts bearing on the injury and claim while the occurrence is still fresh.
2. ———. In cases falling within the scope of the statute, the

notice as specified must be given in accordance with the requirements of the statute as a condition precedent to an action on the claim, and this must be done regardless of whose negligent act created the defective condition.

APPEAL from the district court for Thayer county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

Baldwin & Baldwin and *Robert B. Waring,* for appellant.

Walter C. Weiss, contra.

Heard before SIMMONS, C. J., ROSE, PAINE, CARTER, MESSMORE and JOHNSEN, JJ., and ELLIS, District Judge.

ELLIS, District Judge.

In this case the plaintiff below and appellant here filed her petition seeking to recover for personal injuries sustained as a result of falling into an open sewer ditch which had been dug at right angles to the paved portion of a street in defendant city and across a footpath paralleling the pavement.

The petition alleges that the ditch was dug by the defendant through its agents and that it was negligently left open and unguarded by the defendant. The petition contained other allegations appropriate in an action of this kind, but did not allege that any notice, either of the defect in the public way or of plaintiff's accident, injury and claim, was ever given to the public officials of the defendant. To this petition the defendant interposed a general demurrer which was sustained by the trial court. From this ruling plaintiff has appealed.

The ruling of the trial court was expressly based on the failure of the petition to allege the giving of notice provided for in section 17-582, Comp. St. 1929, or excuse for not having done so. Plaintiff in her brief frankly concedes that, if the notice provided for in the statute was required to be given in the situation alleged, the ruling of the trial court was correct.

It thus appears that the disposition of this appeal depends upon interpretation and applicability of section 17-

582. Our problem is to determine the legislative intent and purpose as expressed in this statute. Plaintiff contends that, because of the fact that the defendant city itself created the defect and, having done so, left it unguarded, the statute does not apply and notice was not a condition precedent to plaintiff's right to sue.

Without quoting the statute in full, it requires notice in writing "of the *accident* or *injury*" with a statement "of the *nature* and *extent* thereof, so far as the extent of the *injury* is known at the time, and of the time when and the place where the same occurred." (Italics ours.) The statute also provides for extension of the 30 days allowed where the injured person is disabled by the injury from giving the notice. The statute also provides that no costs shall be recovered against the city on claims allowed in part unless the recovery by action shall be for a greater sum than that allowed with interest thereon.

From an examination of the cases involving liability of municipalities for negligence, it appears that the matter of notice as a condition precedent to suit has been considered under two different types of statute or charter provisions—the one type requiring notice of the defect before occurrence of the injury and the other requiring notice after the event. The matter of notice has also been considered where the negligence occurred as a result of operations of the municipality in the governmental and corporate fields on the one hand and in the nongovernmental or proprietary field on the other hand.

McQuillin in his work on Municipal Corporations, Vol. 6 (2d ed.) 1277, sec. 2887, says: "It is necessary to keep in mind that notice of the defect before the accident is one thing, and notice of the accident is another and entirely different thing."

The case of *Enyeart v. City of Lincoln*, 136 Neb. 146, 285 N. W. 314, involved a charter provision requiring notice of the defect five days before the occurrence of such injury or damage. It was held in that case that where the ground of the action was positive misfeasance on the part of the

city (it appearing from the evidence that the city had constructed the walk) notice was not essential. This decision followed the holding of this court in *Updike v. City of Omaha*, 87 Neb. 228, 127 N. W. 229. In the latter case the court held that undoubtedly the real purpose of requirement of notice of the defect before the accident was to enable the city to prevent accidents by repairing or guarding the defect, and therefore the statute had no application where the act of the city itself created the dangerous condition, since knowledge of its existence was inherent in the creative act itself. In that case the court discussed a statute like the one involved in the principal case and said: "The object of the statute was to enable the city officials to *properly investigate* the nature and validity of the *claim* presented." (Italics ours.) This case and those preceding it clearly point out the reason for exemption from the requirement of notice of the *defect* where created by the acts of the municipality.

Plaintiff cites language from *Randall v. City of Chadron*, 112 Neb. 120, 198 N. W. 1020, immediately preceding citation of *Tewksbury v. City of Lincoln*, 84 Neb. 571, 121 N. W. 994, and *City of Omaha v. Jensen*, 35 Neb. 68, 52 N. W. 833. It will be observed that in the *Randall* case the action was for damages from flood waters overflowing from streets and it was held that the statute here involved did not apply. The *Tewksbury* case involved a charter provision requiring notice before the injury or damage, and in the *Jensen* case no charter provision appears from the opinion to have been involved and the case turned on the matter of notice of the defect before the injury. It therefore appears that the language cited could not have application to and constitutes no precedent in a situation like that now before us.

In *McCollum v. City of South Omaha*, 84 Neb. 413, 121 N. W. 438, Justice Rose, in discussing a charter provision requiring notice of the accident and injury, said: "The lawmakers in requiring prompt notice of claims for damages arising from defective sidewalks evidently had in mind the

necessity of information and the opportunity of investigation at a time when knowledge of the facts relating to accidents can be ascertained. Information of this character is essential to the interests of the city in adjusting claims and in defending suits."

In *Pasold v. Town of DeWitt,* 198 Ia. 966, 200 N. W. 595, the court said: "The purpose of the statute in requiring notice of the time, place, and circumstances, is to permit the city to investigate the matter while it is fresh." That court points out the distinction between this type of case and those involving statutes requiring notice of the defect itself prior to the injury, in which it is held that notice is not required where the defect is created by the corporation itself.

This very statute was before this court in *Chaney v. Village of Riverton,* 104 Neb. 189, 177 N. W. 845, and the court in considering the intention of the legislature said: "The object of the statute was to enable city officials to properly investigate the nature and validity of such claims at a time when knowledge of the facts relating to the accident could be ascertained, and such information preserved for use by such officials as might be in charge of the city's affairs when the matter later came up or the case was tried or defended, and in order that spurious or unmeritorious claims might be avoided."

In *Henry v. City of Lincoln,* 93 Neb. 331, 140 N. W. 664, this court pointed out the distinction between the duties and liabilities of municipalities in the governmental and corporate fields on the one hand and in the private business or proprietary field on the other hand and held that a statute similar to the one involved here did not apply to claims resulting from operations in the latter field. In discussing the similar statute the court said: "The object of the notice, when required, is well understood to be to give the municipality an opportunity to investigate, and to protect against fictitious claims."

The liability of municipalities in this type of case has its basis in statutory duties and powers imposed and granted

by the legislature. It necessarily follows that the legislature may impose conditions precedent to the enforcement of such liability. Upon the wisdom of conditions imposed we have no right to pass, although in cases of this kind it does seem that a fresh opportunity to ascertain all the facts surrounding the occurrence of the accident and injury would be conducive to more adequate protection of the public interest. Knowledge of an admittedly dangerous condition may involve notice that an accident or injury is likely to follow, but that is not notice that it has happened. It is quite apparent that knowledge of the operation out of which the defect arose would not involve knowledge of contributory negligence which might be a complete defense to the claim and proof of which might become more difficult or impossible upon long delay on assertion of the claim. Likewise, knowledge of the operation would not involve knowledge of intervening acts of third persons which might materially and substantially affect the liability of the municipality. Many other considerations suggest themselves and constitute ample support for a legislative purpose to require notice of injury and claim therefor.

Considering the specifications in the statute of the information which must be contained in the notice—*the accident or injury—the nature and extent thereof*—as well as the previous expressions of this court, we conclude that its primary purpose was to afford to the municipal authorities prompt notice of the accident and injury in order that an investigation may be made while the occurrence is still fresh and the municipal authorities placed in a position to intelligently consider the claim, allow it if deemed just, or in the alternative to adequately protect and defend the public interest.

Having come to this conclusion, the argument that the city having by its own act created the defect should be held to have knowledge of its existence and the requirement of notice avoided is not persuasive. To extend the rule of the *Updike* and similar cases to include the notice statute here involved would be to extend the rule beyond the rea-

son therefor so clearly pointed out in those cases. The plaintiff's cause of action falls within the scope of cases to which the statute is applicable, and since we hold that the purpose of the statute is to give notice of the accident and injury, as distinguished from mere notice of the defect, it follows that the notice must be given in accordance with the requirements of the statute as a condition precedent to an action on such a claim and that this must be done regardless of whose negligent act created the defective condition.

We have examined the case of *Hughes v. City of Fond du Lac,* 73 Wis. 380, 41 N. W. 407, cited by the plaintiff as well as subsequent decisions of the Wisconsin court and think that the distinction between that case and cases like the principal one is pointed out by that court in its subsequent decisions. We think the rule in that state is in accord with our conclusion herein.

Without further discussion, we are of the opinion that the demurrer was properly sustained.

The judgment is

AFFIRMED.

SIMMONS, C. J., and MESSMORE, J., dissent.

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3. A testamentary gift of residuary estate to a church was a "present gift," with right of possession and enjoyment conditionally postponed, and hence not violative of the rule against perpetuities. *Reithmiller v. Carr* 284
4. Failure of church to complete church building for a period of nine years after testator's death did not, under the circumstances, constitute a renunciation or defeasance of a gift. *Reithmiller v. Carr* 284

Commerce.

Under federal statutes, congress has occupied the entire field of interstate business of telegraph companies. *Burke v. Western Union Telegraph Co.* 878

Constitutional Law.

1. Where a regulatory statute prohibits price discriminations made with the intent substantially to lessen competition, or to injure or destroy the business of a competitor, constitutional inhibitions are not infringed. *Nelsen v. Tilley* 327
2. The survey provisions of the act regulating sales of motor vehicles are advisory and of a regulatory nature not inimical to constitutional provisions. *Nelsen v. Tilley* 327
3. A provision in a regulatory statute limiting issuance of a motor vehicle dealer's license for sale of new cars to persons enfranchised by manufacturers of new motor vehicles is an unlawful restriction on the right of a person to adopt and follow a lawful industrial pursuit. *Nelsen v. Tilley* 327
4. A section of a regulatory statute which authorizes the administrator to deny an application or revoke a license on proof of applicant's unfitness is not unconstitutional as conferring arbitrary power, where appeal to the courts is provided. *Nelsen v. Tilley* 327
5. The right to engage in a lawful occupation cannot be taken away under the guise of regulation, but such an occupation may be subjected to regulation in the public interest, even though such regulation involves limitation on exercise of the right regulated. *Nelsen v. Tilley* 327
6. Liberty, as used in the state and federal Constitutions, implies absence of arbitrary restraint, not immunity from

reasonable regulations and prohibitions imposed in the interests of the community. *Nelsen v. Tilley* 327
7. Whether an occupation is charged with such a public interest as to warrant its regulation is a legislative question with which the courts ordinarily will not interfere. *Nelsen v. Tilley* 327
8. Borrowers of money under congressional acts cannot question the validity of those acts. *Federal Farm Mtg. Corporation v. Hughes* 454
9. The statute which makes a stay bond a judgment against the surety does not conflict with the due process clauses of the state and federal Constitutions. *Baker Steel & Machinery Co. v. Ferguson* 578
10. Whether housing authority acts will accomplish their object is a legislative matter and not for the courts. *Lennox v. Housing Authority of City of Omaha* 582
11. The provisions of the housing authority act providing for conveyance of property to the federal government for slum clearance and low-rent housing projects are invalid. *Lennox v. Housing Authority of City of Omaha* 582
12. Where constitutional restrictions are not imposed, the legislature may by curative act validate any proceeding which it might have lawfully authorized in the first instance. *Lennox v. Housing Authority of City of Omaha* 582
13. The legislature cannot by curative act destroy vested rights or impair obligations of contracts. *Lennox v. Housing Authority of City of Omaha* 582
14. Where the legislature passed legislation remedying alleged defects in a prior housing authority act, and it does not appear that a judicial determination of unconstitutionality has intervened, that vested rights were infringed, or that obligations of contracts were impaired thereby, alleged defects in prior act are immaterial. *Lennox v. Housing Authority of City of Omaha* 582
15. Statutes creating housing authorities to operate for slum clearance and construction of dwellings for persons of low income, and granting the housing authority the right of eminent domain for the accomplishment of such public purpose, are not violative of the due process clauses of the state and federal Constitutions. *Lennox v. Housing Authority of City of Omaha* 582
16. The housing authority acts are not violative of the constitutional provisions prohibiting the taking or damaging of private property for public use without compensation. *Lennox v. Housing Authority of City of Omaha* 582

17. The housing authority acts do not grant special privileges to those entitled to housing benefits, since they involve a public purpose. *Lennox v. Housing Authority of City of Omaha* 582
18. The granting of administrative discretion is not an unconstitutional delegation of a legislative function, where adequate standards to guide the exercise of such discretion are provided for by the statute authorizing it. *Lennox v. Housing Authority of City of Omaha* 582
19. The housing authority acts do not delegate legislative functions to the housing authority. *Lennox v. Housing Authority of City of Omaha* 582
20. The legislature cannot delegate its powers to make a law, but it can make a law to become operative on the happening of a certain contingency or on an ascertainment of a fact on which the law intends to make its own action depend. *Lennox v. Housing Authority of City of Omaha* 582
21. The habitual criminal law does not contravene the Constitution. *Davis v. O'Grady* 708
22. The making of a public exhibition of religious worship in the form of a seance in public for gain is not a religious liberty guaranteed by the Constitution. *Dill v. Hamilton* 723
23. A state may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions on them. *Jewel Tea Co. v. City of Geneva* 768
24. Where contractual and vested rights are created pursuant to statute, they cannot be destroyed by a subsequent act of the legislature. *Ritter v. Drainage District* 866
25. A legislative act will not operate retrospectively to invalidate contracts or interfere with vested rights. *Ritter v. Drainage District* 866

Contempt.

1. Where a contempt proceeding is instituted by information and a rule to show cause, defendant must file answer if he desires to traverse the facts charged, and failing to so do, the court may treat the facts alleged in the information as confessed. *State, ex rel. Wright, v. Hinckle* 735
2. Contumacious refusal of witness before a referee to answer a legal and proper interrogatory was properly punished by imprisonment. *State v. Degele* 810

Contracts.

1. A written contract, couched in clear, unambiguous language, is not subject to construction, and the intent of the parties must be deduced from the language used in the contract. *Hompes v. Goodrich Co* 84
2. A contract whereby a manufacturer gives a jobber a sales agency in a specified territory, and whereby the jobber agrees to purchase a definite amount of manufacturer's products each year and to press their sale to the exclusion of other competing lines, is not void for want of mutuality. *Ansbacher-Siegle Corporation v. Miller Chemical Co* 142
3. Where a contract has no fixed duration, the law implies a reasonable time, and what constitutes a reasonable time must be determined from the nature and circumstances of the case. *Ansbacher-Siegle Corporation v. Miller Chemical Co.* 142
4. An express contract requires a meeting of minds of the contracting parties on the terms and conditions of the contract and an intention to contract with reference thereto. *Wrede v. City of David City* 194
5. A transaction between a father and an adult son does not presumptively create a confidential or fiduciary relation between them with reference thereto. *Martindale v. Panter* 522
6. Where an optionee fully performs an option agreement and the optionor receives and accepts all benefits provided in the option contract, the optionor is estopped to assert that the acceptance thereof has not been made within the time provided in the agreement. *In re Estate of Lee* 567
7. An instrument wherein A states "I owe B $1,300" is an unconditional admission of an existing debt. *Miller v. Jones* 605

Corporations.

1. Generally, subsequent stockholders have no standing to attack prior mismanagement of the corporation. *Reils v. Nicholas* 19
2. The right of a stockholder to sue directors for corporate wrongs exists because of special injury to him for which he is otherwise without redress; but if his interest is trifling and the injury is of no consequence, he cannot sue to compel righting of wrongs to the corporation. *Reils v. Nicholas* 19
3. A resolution by directors of a corporation authorizing a bank to honor checks drawn to order of certain offi-

cers named therein does not, as a matter of law, relieve the bank from making inquiry where an officer of the corporation offers to pay his individual notes to the bank with a check on the corporation account therein, since, if it is an unauthorized use of corporation funds, the bank may be held liable therefor. *Kuhns v. Live Stock Nat. Bank* 459

Costs.

Under section 20-1708, Comp. St. 1929, costs are allowed plaintiff on a judgment in actions for recovery of money only. *Shellenbarger v. Shellenbarger* 762

Counties.

1. The amount of a county treasurer's salary depends upon the population of the county for the year in question. *Shambaugh v. Buffalo County* 434
2. The population of a county for a particular year must be determined by competent evidence. *Shambaugh v. Buffalo County* 434

Courts.

1. Jurisdiction of the subject-matter is to be tested by the authorized extent of the powers of the court in respect of the cause of action before it. *In re Guardianship of Warner* 25
2. In a court of record, if the record does not show want of jurisdiction, jurisdiction will be presumed. *In re Guardianship of Warner* 25
3. In the administration of the federal employers' liability act, pertinent opinions of the federal courts are binding on state courts. *Bocian v. Union P. R. Co* 318
4. County courts have equity powers in matters within their exclusive original jurisdiction. *In re Estate of Lee* 567
5. A construction by the United States supreme court of an act of congress controls the action of state courts. *Burke v. Western Union Telegraph Co* 878

Creditors' Suit.

1. Where other remedies are inadequate, an equity court has power to take unexempt property of a debtor and apply it to the payment of the owner's debts. *Meyer v. Platt* 714
2. The beginning of a creditors' suit, issuing of process and serving thereof give a specific lien on the property which it is sought to reach. *Hilton v. Clements* 791
3. The filing of a creditors' bill and service of process is a lien on the equitable assets of a judgment debtor, without issuance of a restraining order. *Hilton v. Clements* 791

Criminal Law.

1. In a prosecution for rape, the trial court did not err, in absence of a request, in failing to instruct as to the lesser offenses of assault and assault and battery. *Haynes v. State* 69
2. In a prosecution for rape, it is not prejudicial error for the trial court to set out verbatim in his instructions the charging part of the information, where the court follows the instruction with an instruction in its own language as to the material elements of the offense. *Haynes v. State* 69
3. If an act be an offense against the state and also against a municipality of the state, it may constitute an offense against both, and both may punish it without infringing any constitutional right. *State v. Hauser* 138
4. A conviction may rest on uncorroborated evidence of an accomplice when, considered with other evidence, it satisfies the jury beyond a reasonable doubt of guilt of accused. *Ruzicka v. State* 473
5. In a prosecution for larceny, uncorroborated evidence of an accomplice who had wilfully sworn falsely in regard to material matters, and whose evidence was generally unreliable, was insufficient to sustain verdict of guilty. *Ruzicka v. State* 473
6. Comment of county attorney to jury that "defendant does not get on the stand to tell you about this case" was ground for reversal of judgment under the statute. *Bruntz v. State* 565
7. A plea of guilty waives any defect which is not jurisdictional, and which may be taken advantage of by motion to quash or by plea in abatement. *Thompson v. O'Grady* 641
   State, ex rel. Gossett, v. O'Grady 824
8. The constitutional right of accused to have assistance of counsel may be waived, and a waiver will be implied where accused fails to demand counsel. *Alexander v. O'Grady* 645
9. Accused may, by confession of guilt, waive rights secured to him by the Constitution. *Alexander v. O'Grady* 645
10. The provision of the Civil Code providing what shall be stated in a judgment applies to civil proceedings only. *Dunham v. O'Grady* 649
11. The fact that an accomplice has been guilty of wilfully false-swearing on a material matter is a circumstance that may make his testimony unworthy of belief. *Millslagle v. State* 664

12. Though an accomplice may have been guilty of a conscious falsehood on a material matter, and though his testimony is lacking in corroboration, it may not be utterly unworthy of belief, and an accused's rights will be protected if the jury are instructed that the testimony of an accomplice should be scrutinized closely for possible motives for falsification, and that where he has wilfully sworn falsely in regard to a material matter they should be hesitant to convict on his uncorroborated testimony. *Millslagle v. State* 664
13. A conviction based on the uncorroborated testimony of an accomplice will only be set aside on appeal, where on its face it produces an irresistible conviction of pervading taint or of inherent moral weakness. *Millslagle v. State* 664
14. Conviction for cattle stealing is set aside for improper admission, on rebuttal, of immaterial and incompetent testimony carrying a direct implication of defendant's guilt. *Millslagle v. State* 664
15. The habitual criminal law does not set out a distinct crime, but provides that the repetition of criminal conduct aggravates the guilt and justifies heavier penalties. *Davis v. O'Grady* 708
16. The constitutional right of accused to have the assistance of counsel may be waived, and a waiver will be implied where accused fails to demand that counsel be assigned him. *Davis v. O'Grady* 708
17. A person charged with crime may, by a judicial confession of guilt, waive all rights secured him by the Constitution. *Davis v. O'Grady* 708
18. A statute authorizing imprisonment for violation of its provisions imposes no restrictions on conduct except those specifically enumerated in the statute. *Dill v. Hamilton* 723
19. Where evidence is produced tending to show a common plan by several persons to commit a crime, the statements of each looking toward the carrying out of the plan are competent against the others. *Balis v. State* 835
20. In a prosecution for forgery, county attorney's statement on cross-examination of accused as to other forgeries was prejudicial error. *Balis v. State* 835
21. A declaration by the prosecuting attorney that it is his personal belief that defendant is guilty is highly improper unless such belief is given as a deduction from the evidence. *Balis v. State* 835
22. If the prosecuting attorney's improper conduct is so flagrant that neither rebuke nor instructions to the jury to disregard it can remove its sinister influence, a mistrial should be declared. *Balis v. State* 835

23. The statute subjecting a witness to physical examination to be offered with reference to his physical or mental condition or alleged cause thereof applies only to parties to an action. *Macomber v. State* 882
24. Conviction of a lesser offense than that for which accused was informed against is not a bar to prosecution for a greater offense if accused is granted a new trial. *Macomber v. State* 882

Damages.

Under federal court rules, damages cannot be recovered for mental pain and anguish where no injury is done to person, property, health or reputation. *Burke v. Western Union Telegraph Co.* 878

Death.

A presumption of death arises from the continued and unexplained absence of a person for seven years. *Batth v. Metropolitan Life Ins. Co.* 676

Deeds.

1. In a suit to set aside a conveyance of realty on the ground that grantor lacked mental capacity, the burden is on plaintiff to establish that the grantor's mind was so weak at time of conveyance that he could not comprehend the purport of what he was doing. *Lund v. Woodward* 689
2. Undue influence sufficient to avoid a conveyance of realty is an unlawful and fraudulent influence which controls the will of the grantor. *Lund v. Woodward* 689

Descent and Distribution.

An equitable lien may be impressed on an unexempt portion of the distributive share of an heir, who is a judgment debtor, in an estate in process of administration. *Hilton v. Clements* 791

Dismissal and Nonsuit.

The trial court did not abuse its discretion in permitting voluntary dismissal of a landowner from a suit to enjoin maintenance of a diversion dam and for damages from flooding, brought by the landlord and his tenant, and to allow the tenant to file an amended petition at law for damages to his leasehold. *Thies v. Platte Valley Public Power and Irrigation District* 344

Divorce.

1. The court will consider the child's welfare in awarding its custody. *Crandall v. Luhnow* 13

2. Generally, a court should keep minor children of divorced parents within its jurisdiction. *Crandall v. Luhnow* 13
3. The trial court, granting an absolute divorce, may assign between the parties property acquired during marriage by their joint efforts, as equity may require. *Resnick v. Resnick* 256
4. In a supplemental proceeding in a divorce suit to reform the divorce decree to allow alimony, the district court was without jurisdiction to substitute as a party a special administratrix for a deceased husband who had procured the divorce, where no claim for alimony was made in the original suit. *Kelkenney v. Getsey* 416
5. Evidence that former wife became employed after obtaining divorce and that the husband has remarried was not sufficient basis for modification of allowance for wife and child support, in absence of showing as to the extent of her earnings. *Morris v. Morris* 660
6. On granting an absolute divorce, the court may enter decree in regard to property acquired during marriage by joint efforts of parties as equity demands. *Swanson v. Swanson* 699
7. In awarding custody of a child in a divorce suit, the primary concern of the court in its sound discretion is the welfare of the child, having due regard of the rights of the parents. *Swanson v. Swanson* 699
8. Grant of $14,400 alimony approved. *Swanson v. Swanson* 699

Domicile.

1. One's residence is where he has his established home, and to which, when absent, he intends to return. *In re Estate of Meyers* 60
2. To effect a change of domicile, there must not only be a change of residence, but an intention to permanently abandon the former home. *In re Estate of Meyers* 60
3. The fact that an individual had voted for 50 years in a certain county and, when absent therefrom, either returned in person to vote or voted an absentee ballot, was convincing and persuasive in determining his domicile. *In re Estate of Meyers* 60
4. A person who moves from his place of residence to benefit his health is merely temporarily absent, though actual time spent in the new residence may be long. *In re Estate of Meyers* 60
5. A person who removes from his place of residence in

order to educate a minor child does not thereby usually effect a change of domicile. *In re Estate of Meyers* 60

Drains.

1. It is a duty of the board of supervisors of a drainage district organized under the legislative act of 1905 to repair ditches which become ineffective. *Ritter v. Drainage District* 866
2. The incorporation of a drainage district and construction of a drainage system and the obligations of landowners to pay assessments for drainage create contracts between the district and the landowners. *Ritter v. Drainage District* 866

Elections.

1. An election to a public office, secured by a candidate by means of offers to the voters to perform the duties of the office for less than the legal salary or fees, constitutes a species of bribery which will invalidate an election. *State, ex rel. Burkett, v. Swanson* 704
2. A person becomes a candidate for office when he announces that he will seek election to the office. *State, ex rel. Burkett, v. Swanson* 704
3. A candidate who has become disqualified to hold the office he seeks is necessarily ineligible to run for the office. *State, ex rel. Burkett, v. Swanson* 704

Eminent Domain.

1. Damages recoverable in a condemnation proceeding are only those arising as a consequence of the condemnation. *In re Platte Valley Public Power and Irrigation District* 313
2. Evidence as to value of land taken and damaged by condemnation must be based on its value in condition in which it was at time of condemnation. *In re Platte Valley Public Power and Irrigation District* 313
3. Liability to respond in damages arises from the nature of the acts, not from the identity of the parties. *In re Platte Valley Public Power and Irrigation District* 313
4. Accretions are property within the section of the Constitution providing that the property of no person shall be taken or damaged for public use without just compensation therefor. *Thies v. Platte Valley Public Power and Irrigation District* 344
5. The state was not deprived of its right to appeal from a condemnation award by the act of an unauthorized agent of the state. *Peterson v. Department of Roads and Irrigation* 354

6. The federal government has no power to take or condemn private property for low-rent housing and slum clearance projects, since such purpose is not a public use within the purview of the federal Constitution. *Lennox v. Housing Authority of City of Omaha* 582
7. While there is merit in giving short instructions, elaboration can be overlooked in an instruction dealing with the measure of damages in condemnation proceedings. *Pearse v. Loup River Public Power District* 611
8. Judgment for $1,883 in condemnation proceedings was reduced to $1,200. *Pearse v. Loup River Public Power District* 611

Evidence.

1. Cogent reasons that strengthen the opinion of an expert witness as to a scientific fact may determine the issue. *Maul v. Iowa-Nebraska Light & Power Co* 128
2. Nebraska courts may take judicial notice of federal statutes and proclamations of the president. *Federal Farm Mtg. Corporation v. Hughes* 454
3. Any witness with a knowledge of time and distance is competent to give an estimate of the speed of an automobile. *Carnes v. DeKlotz* 787
4. Where a witness had no reasonable time or opportunity to formulate a basis for an opinion as to the speed of an automobile, his testimony was insufficient to sustain a finding of excessive speed. *Carnes v. DeKlotz* 787
5. The supreme court will not take judicial notice of rules of practice of a district court. *Federal Farm Mtg. Corporation v. Hughes* 820

Executors and Administrators.

1. Essential averments of a petition for administration are that deceased died intestate, and was at time of death a resident or inhabitant of the county where the petition is filed or, if a nonresident, that he left an estate in the county to be administered. *In re Estate of Sheerer* 374
2. In proceeding for appointment of administrator, wherein a petition was filed and notice was given, and objector had actual knowledge of pendency of the proceeding, he could not, more than one year after appointment of administrator, object to the court's jurisdiction on the ground that administrator was not legally married to deceased or had no beneficial interest in the estate. *In re Estate of Sheerer* 374
3. After 30 days from death of deceased, no right of preference for appointment as administrator exists in favor

of the widow or next kin of deceased, or the person designated by them. *In re Estate of Sheerer* 374
4. The functions of a special administrator are to possess, control and preserve the estate of a deceased until granting of letters testamentary or of administration. *Kelkenney v. Getsey* 416

Exemptions.

The statute exempts from execution or attachment 90 per cent. of wages of a judgment debtor. *Live Stock Nat. Bank v. Jackson* 161

Forgery.

In a prosecution for forgery, a variance between an instrument described in the information and the evidence is not fatal unless it is material to the merits of the case or prejudicial to the rights of the accused. *Balis v. State* 835

Fraudulent Conveyances.

1. Conveyance from judgment debtor to son *held* fraudulent. *Farmers State Bank of Ewing v. Dierks* 442
2. Transactions between a brother and sister, by which property is transferred by one who is unable to pay his debts, should be carefully scrutinized, and are presumptively fraudulent, so as to impose the burden on one asserting good faith thereof to prove it. *Hilton v. Clements* 791
3. The question of fraudulent intent is a question of fact. *Hilton v. Clements* 791
4. Where testimony relied on to show good faith is given by interested relatives, the reasonableness or unreasonableness of their evidence bears considerable weight in arriving at a just conclusion. *Hilton v. Clements* 791

Garnishment.

In garnishment in aid of execution, only answer and evidence of garnishee are admissible in response to the summons. *Searcey v. Badgett* 185

Habeas Corpus.

1. On an application for a writ of habeas corpus, errors or irregularities in the criminal trial which are not jurisdictional will not be considered. *Hawk v. O'Grady* .. 639
2. To obtain release by habeas corpus, the judgment or sentence must be an absolute nullity. *Hawk v. O'Grady* 639
State, ex rel. Gossett, v. O'Grady 824

3. Habeas corpus will not lie to discharge one serving a penal sentence, if the court imposing sentence had jurisdiction of the offense and the person, and to impose sentence. *Alexander v. O'Grady* 645
4. Section 29-2814 of the habeas corpus statute is limited to cases where one is in custody by virtue of a warrant or commitment of a magistrate, and has no application to cases where persons are imprisoned under sentence imposed by courts of record. *Dunham v. O'Grady* 649
5. Section 83-935 of the habeas corpus statute is applicable to one who is confined in the state penitentiary. *Dunham v. O'Grady* 649
6. Habeas corpus is a collateral and not a direct proceeding, when regarded as a means of attack on a judgment sentencing a defendant. *Davis v. O'Grady* 708
7. The judgment or sentence of a court of record in a criminal case is supported by the usual presumptions of validity and regularity, when attacked in a habeas corpus proceeding. *Davis v. O'Grady* 708
8. To obtain release from a sentence of imprisonment by habeas corpus, the sentence must be absolutely void. *Davis v. O'Grady* 708
9. Where an information charges distinct offenses in two or more counts, a defendant cannot complain in a habeas corpus proceeding of a sentence on a general verdict imposing a penalty applicable to either offense without designating on which count it is based. *Davis v. O'Grady* 708
10. Habeas corpus is never allowed as a substitute for an appeal or proceeding in error. *Davis v. O'Grady* 708
11. Habeas corpus is a collateral proceeding, when regarded as a means of attack on a judgment sentencing a defendant. *State, ex rel. Gossett, v. O'Grady* 824

Hawkers and Peddlers. SEE MUNICIPAL CORPORATIONS, 13, 15, 16. NUISANCE, 5.

Health.

1. Statutes creating housing authorities for slum clearance and low-rent dwellings constitute a proper exercise of the police power. *Lennox v. Housing Authority of City of Omaha* 582
2. The elimination of unsafe and dilapidated tenements by replacement with safe, sanitary, low-rent dwellings is a legitimate object for the exercise of the police power. *Lennox v. Housing Authority of City of Omaha* 582

Homestead.

1. Though a homestead cannot be claimed in two separate properties at the same time, homestead claimants who were about to lose their homestead as result of foreclosure proceedings could abandon it and establish a new homestead in other property. *Hawley v. Arnold* 238
2. A building consisting of a single structure under one roof was a "dwelling-house" within the meaning of the homestead statute, though it was divided into two parts by a solid wall and one-half was rented. *Hawley v. Arnold* 238
3. In a suit to have a judgment declared not a lien on premises claimed as a homestead, evidence sustained finding that there was no equity in the property above encumbrances and homestead exemption. *Hawley v. Arnold* 238
4. The extent of a homestead is not to be determined from the fee-simple value of the land, but from the value of the homestead claimant's interest therein. *Hawley v. Arnold* 238
5. A wife cannot by will dispose of the life estate of her husband in the homestead, in absence of waiver by him. *Abboud v. Boock* 652
6. The right of a surviving husband to a life estate in the homestead is fixed by statute, and any disposal thereof must be in strict compliance with the statute. *Abboud v. Boock* 652
7. A surviving husband is not estopped from asserting his life estate in the homestead because he entered into a joint will with his wife without mentioning the homestead, or because he qualified as executor of her will. *Abboud v. Boock* 652
8. Generally, where a homestead right of exemption has attached to realty, the homestead property may be exchanged for another homestead and the right of exemption will follow and attach to the new homestead. *Meyer v. Platt* 714
9. The statutory protection to proceeds of sale of a homestead applies to property received in exchange for the homestead, not exceeding in value the amount of the exemption. *Meyer v. Platt* 714
10. The fact that the owner of realty denies his title will not deprive him of the benefit of homestead exemption laws. *Meyer v. Platt* 714
11. A formal declaration that certain land has been selected

as a homestead is not a necessary element in establishment of a homestead right. *Meyer v. Platt* 714
12. Where a judgment had become a lien against realty, and subsequently a right of homestead attached thereto, the judgment lien was paramount to the claim of a homestead exemption. *Welch v. Falk* 764

Homicide.

1. In a prosecution for shooting with intent to kill or wound, the trial court erred in instructing the jury that the law warranted the presumption that a person intends the consequences which ordinarily follow an intentional act, where witnesses were present at time of shooting and testified fully thereto and to attendant circumstances. *Vallas v. State* 250
2. In a prosecution for shooting with intent to kill or wound, intent is an essential element, and a presumption of law does not take the place of testimony of witnesses who were present and testified to details of the shooting and attendant circumstances. *Vallas v. State* 250

Indictment and Information.

1. A deputy county attorney may sign a criminal information. *Thompson v. O'Grady* 641
2. When the right of a person to sign an information as deputy county attorney is questioned for the first time after arraignment and plea of guilty, his appointment and qualification will be presumed. *Thompson v. O'Grady* 641
3. One who aids in the commission of a crime may be charged in simple and direct terms as if he were the principal offender, but a statement of the manner of his alleged participation in the crime, though unnecessary, does not make the information bad. *Millslagle v. State* 664
4. Criminal informations may be verified by the county attorney, complainant, or some other person. *State, ex rel. Gossett, v. O'Grady* 824
5. Words descriptive of the character of affiant in the verification of a criminal information may be disregarded. *State, ex rel. Gossett, v. O'Grady* 824
6. Where an objection to an information is not made at the time prescribed by law, the objection is waived. *State, ex rel. Gossett, v. O'Grady* 824
7. Where accused failed to object to information, on ground that it was not signed by county attorney, before plea to the merits, there was a waiver of the alleged error. *State, ex rel Gossett, v. O'Grady* 824

Injunction.

1. The state could enjoin threatened diversion of realty by a religious association and a mortgagee of the realty which had been dedicated by the state to the association for church purposes. *State, ex rel. Hunter, v. Home Savings & Loan Ass'n* 231
2. An injunction is a command to refrain from a particular act. *Conrad v. Kaup* 900
3. The remedy by injunction is wholly preventive, prohibitory, or protective. *Conrad v. Kaup* 900
4. Rights lost and wrongs perpetrated cannot be corrected by injunction. *Conrad v. Kaup* 900

Insane Persons.

1. The rules as to collateral attack are applicable with full force to proceedings *in rem* and *quasi in rem*, such as adjudications of insanity and determinations of mental incompetency. *In re Guardianship of Warner* 25
2. Admissions, declarations, and facts inconsistent with mental soundness are admissible on the issue of sanity. *In re Guardianship of Warner* 25

Insurance.

1. Evidence in action on insurance policy did not show as a matter of law that insured was not in good health at time of issuance and delivery of policy. *Gugelman v. Kansas City Life Ins. Co* 411
2. The usual rules for construction of contracts apply to fire insurance policies. *Peony Park v. Security Ins. Co* 504
3. Any fair doubt as to meaning of words of a policy should be resolved against the one who prepares it. *Peony Park v. Security Ins. Co* 504
4. If provisions of an insurance policy are clear and unambiguous, the rule of strict construction against insurer does not apply. *Peony Park v. Security Ins. Co.* 504
5. A fire insurance policy will not be extended to cover property not clearly within the express terms of the policy. *Peony Park v. Security Ins. Co* 504
6. Under a fire insurance policy covering contents of a dance pavilion "and additions," a refreshment stand built some 42 feet from the pavilion was not "an addition" to the main dance pavilion, although used in connection therewith. *Peony Park v. Security Ins. Co* ... 504
7. Where a fire policy covers contents of a building, the word "contents" is a term which should have some

fixed relation to the building in which "contents" is located. *Peony Park v. Security Ins. Co*..... 504
8. Where personal property insured as contents of a dance pavilion was removed therefrom to a new building which was covered by a separate policy, such personal property was no longer protected as "contents" of the dance pavilion. *Peony Park v. Security Ins. Co*..... 504
9. A benefit thrift certificate containing a savings feature was *held* to be an insurance contract within the law governing insurance contracts. *State, ex rel. Smrha, v. Cosmopolitan Old Line Life Ins. Co*..... 742
10. Under a contract containing both thrift and term insurance features, where the premium paid was made for both features of the contract, the fund created by premium payments was liable for all the company's obligations. *State, ex rel. Smrha, v. Cosmopolitan Old Line Life Ins. Co*..... 742
11. Where life insurer attempts to set up property rights and benefits out of premiums which it collects on its integrated obligations, terms and conditions of such benefits must comply with statute governing life and endowment policies, including provision for three-year reinstatement. *State, ex rel. Smrha, v. Cosmopolitan Old Line Life Ins. Co*..... 742
12. Holder of benefit thrift certificate *held* entitled to statutory right to reinstatement. *State, ex rel. Smrha, v. Cosmopolitan Old Line Life Ins. Co*..... 742

Judgment.

1. Error in holding the petition sufficient will not render the judgment subject to collateral attack. *In re Guardianship of Warner*..... 25
2. Omission of allegation of a jurisdictional fact is cured by proof of its existence, and where the judgment is silent as to such fact, jurisdiction will be presumed. *In re Guardianship of Warner*..... 25
3. A collateral attack on a judicial proceeding is an attempt to avoid or deny its force and effect in some manner not provided by law. *In re Guardianship of Warner*..... 25
4. When a judicial order, judgment or proceeding is offered in evidence in another proceeding, an objection thereto on account of judicial errors is a collateral attack. *In re Guardianship of Warner*..... 25
5. Evidence sustained judgment denying application to vacate a default decree. *Drake v. Ralston*..... 72

6. Objection to revivor of dormant judgment on ground that judgment was void was properly overruled. *Kinyoun v. Reinsh* 325
7. In a suit to vacate or modify a decree on the ground of fraud, plaintiff must prove due diligence at the former trial, and that his failure to plead his defense was not attributable to his own fault. *Martindale v. Panter* 522
8. After courts have determined issues presented in an action and time for direct action has expired, litigants cannot maintain a collateral action to set aside those proceedings so they can present in the original action issues which could have been raised in that litigation. *Clayton v. Evans* 574
9. A stay bond given to obtain a stay of execution, when recorded, is a judgment within the purview of statutes providing for revivor of dormant judgments. *Baker Steel & Machinery Co. v. Ferguson* 578
10. A dormant judgment may be revived at any time within ten years after it becomes dormant. *Baker Steel & Machinery Co. v. Ferguson* 578
11. The only defenses available against an application to revive a dormant judgment are that there is no judgment to revive, that the judgment is void, or that the judgment was paid or otherwise discharged. *Baker Steel & Machinery Co. v. Ferguson* 578
12. The validity of an assignment of a dormant judgment may not be adjudicated in a proceeding to revive it. *Baker Steel & Machinery Co. v. Ferguson* 578
13. A judgment of dismissal in a criminal prosecution cannot be given in evidence in a civil action to establish the truth of the facts on which it was rendered. *Hampton v. Westover* 695
14. In a suit in equity, relief to which plaintiff is entitled under his petition and proofs may be granted pursuant to his general prayer. *Hilton v. Clements* 791
15. Under a prayer for general and special relief, the court may give such relief as the case warrants. *Hilton v. Clements* 791
16. A decree of foreclosure of a tax lien against unknown owners of land rendered on service by publication is of no effect as against persons in possession of the land who were not made parties to the suit and had no notice thereof. *Harris v. Heeter* 905

Judicial Sales.

An unconfirmed judicial sale is not a nullity, and, as against a collateral attack, will be treated as valid. *Marker v. Scotts Bluff County* 360

Jury.

1. In a guardianship proceeding, the issues involved not being triable to a jury as a matter of right, the verdict is only advisory. *In re Guardianship of Warner* 25
2. A trial by jury cannot be demanded as a constitutional right, in proceedings for the appointment or removal of guardians, in absence of a statute providing therefor. *In re Guardianship of Warner* 25
3. In proceedings not within the application of constitutional provisions, the fact that an appeal is allowed does not entitle the parties to demand a jury trial. *In re Guardianship of Warner* 25
4. The interposition of a jury in trials of appeals from probate courts to district courts is mandatory only when the inherent nature of the issues to be determined, in the light of constitutional and code provisions or express statute, so require. *In re Guardianship of Warner* 25
5. The interposition of a jury in trials of appeals from county courts to district courts, where there is involved only the appointment or refusal to appoint guardians for incompetents, is a matter of discretion and not a matter of right. *In re Guardianship of Warner* 25
6. The purpose of constitutional provisions guaranteeing right of trial by jury was to preserve the right as it existed at common law and under statutes in force when the Constitution was adopted. *State v. Hauser* 138
7. The legislature may prescribe that petty offenses, not recognized as crimes by the statutory or common law existing at time of adoption of the Constitution, may be determined without the intervention of a jury without offending constitutional provisions on the subject. *State v. Hauser* 138
8. Where the offenses of drunkenness and driving a motor vehicle while intoxicated are created by ordinance, with a fine of $50 fixed as the maximum penalty for violation of either, they will be classed as petty offenses which may be determined by a police magistrate without a jury. *State v. Hauser* 138
9. On appeal to the district court from a judgment of the municipal court imposing a penalty for violation of a

city ordinance, defendant is entitled to a jury trial under the statute. *State v. Hauser* 138

Kidnaping.

1. A guide to construction of the kidnaping statute is found in the evil which it is designed to remedy, in the light of contemporaneous events. *Macomber v. State* 882
2. The kidnaping statute is not all-inclusive, and does not cover several other offenses provided for by different sections of the Criminal Code, and warrants the strict construction that the legislature did not so intend such statute at the time of its enactment. *Macomber v. State* 882
3. Evidence was insufficient to sustain conviction for kidnaping. *Macomber v. State* 882

Landlord and Tenant.

Evidence in action by lessee against lessor for pasturage and hay sustained judgment for defendants. *Thomas v. Sheldon Co.* 181

Licenses.

1. The power to regulate includes authority to license and to collect a reasonable license fee. *Nelsen v. Tilley* 327
2. The sale of new motor vehicles is a lawful business which any person has a right to pursue, subject only to reasonable regulation. *Nelsen v. Tilley* 327

Limitation of Actions.

1. The defense of limitations, if not raised by demurrer or answer, is waived. *Hadley v. Corey* 204
2. An action for assault and battery is barred in one year. *Markel v. Glassmeyer* 243
3. A promise to pay a debt founded on written contract, to prevent running of limitations, must be in writing. *Brainard v. Hall* 491
4. Absence from the state will not extend the time in which a real estate mortgage foreclosure may be brought against a nonresident. *Brainard v. Hall* 491

Lis Pendens.

1. After filing of notice of *lis pendens*, subsequent purchasers or encumbrancers are bound by all proceedings thereafter taken in an action. *Hadley v. Corey* 204
2. The purpose of the rule as to *lis pendens* is to prevent third persons during pendency of the litigation from acquiring interests in the land which would preclude the court from granting the relief sought. *Hadley v. Corey* 204
3. If a purchaser or encumbrancer, subject to *lis pendens*,

becomes a party to the action, he may question the plaintiff's right to recover in the same manner as the original defendant. *Hadley v. Corey* 204

Master and Servant.

1. Child of divorced wife and deceased husband *held* not entitled to recover compensation from employer of deceased father, who during his employment contributed nothing to the child's support. *Meyer v. Nielsen Chevrolet Co* 6
2. Evidence established that a laborer suffered an injury arising out of and in course of employment. *Maul v. Iowa-Nebraska Light & Power Co* 128
3. Injury from strain due to employee's physical condition predisposing employee to injury *held* compensable. *Maul v. Iowa-Nebraska Light & Power Co* 128
4. Evidence in compensation case sustained district court judgment that findings of fact on rehearing before the compensation court were not supported by the record. *Wrede v. City of David City* 194
5. The statute does not require that appellant from award of compensation court sitting *en banc* serve transcribed copy of testimony taken on opposing party before filing same in district court. *Wrede v. City of David City* 194
6. Each case, wherein it is sought to hold the master liable for the wrongful act of his servant, must be determined with a view to surrounding circumstances, character of the employment, and nature of the wrongful act. *Vanderlippe v. Midwest Studios* 289
7. Whether an act of a servant was within the scope of his employment is ordinarily one of fact for the jury. *Vanderlippe v. Midwest Studios* 289
8. In action for death in collision, questions of negligence and of deceased's contributory negligence under the comparative negligence statute were for the jury. *Vanderlippe v. Midwest Studios* 289
9. Under the federal employers' liability act, an interstate carrier is not liable for an assault by a section foreman upon a member of the section crew, unless the negligent act was committed within the scope of the foreman's employment, or was directed or authorized by the carrier. *Bocian v. Union P. R. Co* 318
10. The law that permits a conductor on a passenger car to make a reasonable assault on a dangerous person, when necessary for the protection of passengers, does not apply to a wrongful assault by the foreman of a section crew on a member thereof. *Bocian v. Union P. R. Co* 318

11. Under the federal employers' liability act, liability of an interstate carrier is not created by conduct of the wrong-doer, if he was impelled by motives wholly personal to himself. *Bocian v. Union P. R. Co.* 318
12. Under the federal employers' liability act, the burden of proving an actionable injury resulting from negligence of an officer, agent or employee of an interstate carrier, while the wrong-doer was acting within the scope of his employment, is on the one claiming damages as the proximate cause of such negligence. *Bocian v. Union P. R. Co.* 318
13. A proceeding to modify a compensation award, payable periodically for more than six months, and to recover additional compensation for an increase in disability can only be brought within one year from time employee knows or is chargeable with knowledge that there has been a substantial increase in his disability. *Scott v. State* 348
14. In action for compensation against county, evidence showed that compensation claimant was a county employee. *Steward v. Deuel County* 516
15. Where evidence was insufficient to determine extent of compensation claimant's disability, the cause was remanded for purpose of procuring evidence to determine extent of disability and amount of award. *Steward v. Deuel County* 516
16. Where a reasonable controversy exists as to liability under the compensation law, the employer is not liable for penalty for waiting time pending action in the courts. *Steward v. Deuel County* 516
17. The liability imposed by the federal employers' liability act is liability for negligence of any officer, agent or employee of the carrier, or for any defect or insufficiency due to carrier's negligence in its equipment. *Christenson v. Union P. R. Co.* 538
18. In an action under the federal employers' liability act for damages for personal injuries sustained prior to amendment of act, assumption of risk is a complete defense, if there was no violation of statute enacted for safety of employees contributing to the injury. *Christenson v. Union P. R. Co.* 538
19. In an action for death under the federal act, an employee of mature years will be held to have assumed the risk of dangers normally and necessarily incident to the occupation in which he was engaged. *Christenson v. Union P. R. Co.* 538

20. If an employee knew or ought to have known of unusual and extraordinary risks connected with his employment under the federal act, he will be held to have assumed them. *Christenson v. Union P. R. Co.* 538
21. Directions of a superintendent to an employee to hurry does not preclude the defense of assumption of risk. *Christenson v. Union P. R. Co.* 538
22. The rule requiring an employer to provide reasonably safe places and structures for employees to work does not extend to structures being constructed or demolished, where the successive temporary conditions through which they must pass during such operations are from their nature dangerous. *Christenson v. Union P. R. Co.* 538
23. The failure of an employer to use the safer of two recognized methods of construction is not of itself negligence. *Christenson v. Union P. R. Co.* 538
24. Where it appears that claimant may have sustained partial loss of use of his leg, while testimony in record is directed to question of general industrial disability only, the cause may be remanded for determination whether any impairment of physiological functions of the leg exists, and, if so, the extent thereof, or whether the purported loss of use is wholly affected. *Schmidt v. City of Lincoln* 546
25. A demand for payment of medical expenses is a claim for compensation within the compensation law. *Schmidt v. City of Lincoln* 546
26. A demand for payment of medical expenses within six months after injury is sufficient to support an employee's right to institute proceedings within a year to recover every benefit which has accrued under the compensation law. *Schmidt v. City of Lincoln* 546
27. Where any finding of fact on which the award of the district court in a compensation case depends is not conclusively supported by the evidence, it is the duty of the supreme court on appeal to consider the entire cause *de novo* on the record. *Schmidt v. City of Lincoln* 546
28. A compensation claimant who suffered a permanent partial loss of the use of his left hand and left leg is entitled to recover such proportion of the compensation allowed for total disability as the extent of his loss would bear to the total loss of such members. *Fallis v. Vogel* 598
29. Allowance for temporary total disability followed by

permanent partial disability of employee is fixed by statute. *Fallis v. Vogel* 598
30. The statute providing for appeals from district court to the supreme court in compensation cases containing no provision as to time for filing a bill of exceptions in the supreme court, the general law relating to bills of exceptions for the purpose of appeal from the district court to the supreme court applies. *Fallis v. Vogel* 598
31. An injury is not compensable under the workmen's compensation law, where employee on his own initiative leaves his line of duty for purposes of his own and is killed. *Burlage v. Lefebure Corporation* 671
32. On appeal from compensation court after rehearing before the whole court, filing of petition and transcript in district court within 14 days lodges jurisdiction of the case in district court. *Henderson v. Wilson* 693
33. No præcipe need be filed nor copy of petition served in district court to give it jurisdiction of a compensation case on appeal from award of whole compensation court on rehearing. *Henderson v. Wilson* 693
34. It is the duty of the clerk of the district court under the compensation law to issue a copy of petition for service on adverse party within seven days, on appeal from award of compensation court sitting *en banc* on rehearing, but failure of clerk to so do does not deprive a litigant of his right of appeal. *Henderson v. Wilson* 693

Monopolies.

1. A volume bonus, which provides for a discount to a dealer in accordance with the amount of purchases he makes, is lawful, unless an intent be shown to grant it as a means of injuring or destroying the business of another. *Hompes v. Goodrich Co* 84
2. A conspiracy between two or more persons to destroy the business of another, if carried into effect, is a violation of the statute dealing with unlawful restraint of trade. *Hompes v. Goodrich Co* 84
3. A conspiracy to unlawfully restrain trade may be proved by indefinite acts, conditions and circumstances. *Hompes v. Goodrich Co* 84
4. Where alleged overt acts are in themselves lawful, and the evidence does not tend to show an unlawful intent to conspire against and injure the business of another, an action for unlawful restraint of trade must fail for want of proof. *Hompes v. Goodrich Co* 84

5. A person may refuse to do business with another, whether the refusal is based on reason, whim or prejudice. *Hompes v. Goodrich Co.* 84
6. One engaged in business may meet competitive prices of merchandise without violating the statute dealing with unlawful restraint of trade. *Hompes v. Goodrich Co.* 84
7. Injuries resulting from fair competition are not protected against by either the state or federal Constitutions. *Nelsen v. Tilley* 327
8. The legislature, under guise of regulation, may not indulge in arbitrary price fixing, destruction of lawful competition, or creation of trade restraints tending to establish a monopoly. *Nelsen v. Tilley* 327

Mortgages.

1. Where a deed and contract of defeasance are executed as part of the same transaction, they will be construed as one instrument in determining their effect and the intention of the parties. *Ashbrook v. Briner* 104
2. Where a deed absolute in form is given as security for payment of money, legal title passes to the grantee. *Ashbrook v. Briner* 104
3. Where a deed absolute in form is given as security for payment of money and is accompanied by a defeasance in writing, legal title does not pass to the grantee, and the transaction constitutes a mortgage. *Ashbrook v. Briner* 104
4. Confirmation of mortgage foreclosure sale, approved. *Federal Land Bank v. Price* 188
5. The owner of the equity of redemption had authority to bind mortgaged property by an unrecorded extension agreement in writing, and a cause of action did not accrue on the mortgage, nor the statute of limitations commence to run, until after termination of the stipulated extension period. *Hadley v. Corey* 204
6. The holder of a note secured by a mortgage may maintain an action at law on the note, where neither note nor mortgage contains stipulations making the mortgaged property primarily liable for the debt. *Federal Farm Mtg. Corporation v. Hughes* 454
7. In absence of an agreement by mortgagee to look primarily to his security for satisfaction of the debt, a foreclosure of the mortgage is not a condition precedent to an action at law on the secured claim. *Federal Farm Mtg. Corporation v. Hughes* 454
8. Filing of stipulation reducing amount of judgment in

mortgage foreclosure decree does not vacate decree nor change date thereof. *Alexander v. Oman* 495
9. Filing of request for stay of sale under mortgage foreclosure decree must be filed within 20 days after rendition of decree. *Alexander v. Oman* 495
10. A sale under mortgage foreclosure decree will not be set aside for irregularities or errors not prejudicial to the party complaining. *Alexander v. Oman* 495
11. On appeal from an order confirming a judicial sale of realty, the supreme court must be satisfied that the property was sold for fair value, or that a subsequent sale would not realize a greater amount. *Federal Farm Mtg. Corporation v. Popham* 529
12. The district court may authorize an action at law on a note secured by a mortgage. *Federal Farm Mtg. Corporation v. Cramb* 553
13. A mortgagee may foreclose his mortgage or sue on the note, but he can pursue only one remedy at a time. *Federal Farm Mtg. Corporation v. Cramb* 553
14. After a mortgage foreclosure, the district court may authorize the mortgagee to sue on the note for any deficiency. *Federal Farm Mtg. Corporation v. Cramb* 553
15. In construing a note and mortgage, provisions of each will be given such effect as will carry out the intent of the parties. *Federal Farm Mtg. Corporation v. Cramb* 553
16. The statute providing that, when a petition shall be filed for satisfaction of a mortgage, the court shall have power only to decree delivery of possession of the premises to the purchaser does not abolish action at law on the note. *Federal Farm Mtg. Corporation v. Thiele* 626
17. After suit to foreclose a mortgage is begun, no action at law for recovery of the debt can be had, unless authorized by the court. *Federal Farm Mtg. Corporation v. Thiele* 626
18. Rentals paid under the provisions of the moratory law must be distributed as provided by the act. *Fremont Joint Stock Land Bank v. Morse* 659
19. In suit to foreclose mortgage, mortgagor was allowed $740 as rent for part of premises occupied by mortgagee. *Wood v. Burkhardt* 685
20. Mere inadequacy of price will not preclude confirmation of foreclosure sale, unless the inadequacy is so great as to evidence fraud. *Pringle v. Smith* 903

Municipal Corporations.

1. Where an appointing power is given unconditional author-

ity to remove a public officer or employee in its discretion, it may do so without a hearing. *State, ex rel. Fischer, v. City of Lincoln* 97
2. Where the power of removal of a public official is not expressly conferred, generally, a grant of power to appoint is construed to carry with it, by necessary implication, a grant of unconditional power to remove, if the term of office is not fixed by law and the right to remove is not restricted. *State, ex rel. Fischer, v. City of Lincoln* 97
3. The purpose of the home rule charter provisions of the Constitution was to render cities as nearly independent as possible of state legislation. *State, ex rel. Fischer, v. City of Lincoln* 97
4. The constitutional limitation that a home rule charter must be consistent with and subject to the laws of the state means simply that, on matters of such general concern to the people of the state as to involve a public need or policy, the charter must yield to state legislation. *State, ex rel. Fischer, v. City of Lincoln* 97
5. The legislature cannot, even by a general law, affect the powers of a city under its home rule charter over matters which are purely of local concern, or which only indirectly or remotely affect the people of the state outside the particular municipality. *State, ex rel. Fischer, v. City of Lincoln* 97
6. The right of a city to provide for a particular form of government in a home rule charter is in no way dependent on whether the legislature by statutory enactment has authorized such a form, nor is it subject to the statutory conditions and limitations upon which the legislature may have authorized a city to adopt it. *State, ex rel. Fischer, v. City of Lincoln* 97
7. The city council of Lincoln, under the provisions of its home rule charter, may discharge one of its firemen without a hearing before the council. *State, ex rel. Fischer, v. City of Lincoln* 97
8. The business of maintaining and operating a municipal electric plant and selling current therefrom being outside the governmental powers and functions of a city, the place of furnishing or receiving the electric current is not controlled by the situs with reference to the corporate boundaries of the cities involved in the transaction. *City of Curtis v. Maywood Light Co.* 119
9. Where a city had power to furnish electric current beyond its corporate limits, it had a right to provide service

within the corporate boundaries of another municipality, and hence a contract therefor was not *ultra vires*. *City of Curtis v. Maywood Light Co.* 119
10. A prosecution for violation of a city ordinance, though in form a criminal prosecution, is in fact a civil proceeding to recover a penalty. *State v. Hauser* 138
11. Public funds of a city may be used to aid in establishment of a housing authority. *Lennox v. Housing Authority of City of Omaha* 582
12. Exercise of police power by a municipal corporation must have a rational relation to protection of a basic interest of society and must be reasonable and free from arbitrariness. *Jewel Tea Co. v. City of Geneva* 768
13. The only power which a city has to declare house-to-house solicitation of customers a nuisance is to find that it interferes with the health, peace, order, and good government of the city. *Jewel Tea Co. v. City of Geneva* 768
14. A city ordinance which attempts to prevent one from engaging in a lawful occupation can be impeached as unreasonable, unconstitutional and void. *Jewel Tea Co. v. City of Geneva* 768
15. A city ordinance designed to prevent peddling on private premises *held* invalid. *Jewel Tea Co. v. City of Geneva* 768
16. Municipal power encroaching on individual rights does not exist, unless plainly conferred by law. *Jewel Tea Co. v. City of Geneva* 768
17. A metropolitan utilities district is a municipal corporation. *Nelson-Johnston & Doudna v. Metropolitan Utilities District* 871
18. A municipal corporation may exercise only such powers as are expressly granted, those necessarily or fairly implied in or incidental to powers expressly granted, and those essential to the declared objects and purposes of a municipality. *Nelson-Johnston & Doudna v. Metropolitan Utilities District* 871
19. Statutes granting powers to municipalities are to be strictly construed. *Nelson-Johnston & Doudna v. Metropolitan Utilities District* 871
20. Where a power is granted to a municipality in its proprietary capacity, such as the power to manufacture, sell and distribute gas, power is implied to do whatever is reasonably necessary to effectuate the objects for which the grant is made. *Nelson-Johnston & Doudna v. Metropolitan Utilities District* 871

21. The authority given a municipality to engage in a business enterprise carries with it power to conduct it in the manner in which a private corporation would deal with its property under similar circumstances. *Nelson-Johnston & Doudna v. Metropolitan Utilities District* 871
22. A municipal corporation having the power to manufacture, sell and distribute gas to its inhabitants has the implied power to engage in the selling of gas appliances. *Nelson-Johnston & Doudna v. Metropolitan Utilities District* 871
23. The purpose of the statute dealing with liability of a city for injury resulting from defect in a street and notice of the injury is to afford to the city prompt notice of an accident and injury, as distinguished from mere notice of the defect. *Bethscheider v. City of Hebron* 909
24. The statute requires that notice of an injury resulting from defect in a street must be given as a condition precedent to an action on a claim, regardless of whose negligent act created the defective condition. *Bethscheider v. City of Hebron* 909

Negligence.

1. If facts proved establish a more reasonable probability of actionable negligence, a case cannot be withdrawn from the jury. *Corkle v. Fenton* 54
2. While the question of ordinary negligence is one of fact, yet if, on an examination of the entire evidence, only one inference can be drawn, then it is a question of law for the court. *Corkle v. Fenton* 54
3. Where a pedestrian moved from a place of safety into the path of a moving street car and was struck, he was guilty of more than slight contributory negligence. *Travinsky v. Omaha & C. B. Street R. Co* 168
4. The burden of proving a defendant's negligence rests on the plaintiff and never shifts to the defendant. *Olson v. Omaha & C. B. Street R. Co* 216
5. Though plaintiff may have negligently exposed himself to injury, nevertheless, if defendant, after discovering his exposed situation, negligently injures him or is guilty of negligence in not discovering his dangerous position in time to avoid the injury, and injury results therefrom, plaintiff may still recover. *Carnes v. DeKlotz* 787

New Trial.

Where amount of damages allowed by a jury is clearly inadequate, it is error for the trial court to refuse to set aside the verdict. *Dolen v. Beatrice Restaurant Co.* 247

Nuisance.

1. A place kept for gambling purposes is a public nuisance. *State, ex rel. Hunter, v. The Araho* 389
2. The constitutional provision and statutes permitting pari-mutuel betting on horse races in Nebraska did not authorize gambling on horse races held outside the state. *State, ex rel. Hunter, v. The Araho* 389
3. The fact that a public nuisance against which equitable relief is sought constitutes a criminal act does not preclude a court of equity from enjoining the same. *State, ex rel. Hunter, v. The Araho* 389
4. The equitable relief of enjoining a nuisance is purely preventive and equity does not punish the defendant for what he has done, such punishment being left to the criminal courts. *State, ex rel. Hunter, v. The Araho* 389
5. The act of soliciting orders for goods at private residences without consent of owners or occupants is not a "public nuisance," and may not be punished as a crime or misdemeanor. *Jewel Tea Co. v. City of Geneva* 768

Pleading.

1. A demurrer to the petition is not a proper part of the answer and should be disregarded. *Hadley v. Corey* 204
2. The sufficiency of a petition cannot be raised by incorporating a demurrer in the answer. *Hadley v. Corey* 204
3. By pleading to the merits, the defect that the petition does not state a cause of action is not waived. *Markel v. Glassmeyer* 243
4. By moving for judgment on the pleadings, plaintiff admits facts well pleaded by defendant. *Shambaugh v. Buffalo County* 434
5. Failure to demur or filing of an answer does not waive the right to object to a petition as not stating a cause of action. *Martindale v. Panter* 522
6. Pleading in action founded on an instrument for the unconditional payment of money is governed by statute. *Miller v. Jones* 605

Principal and Agent.

1. Where a manufacturer contracts to make a jobber his agent to sell his goods exclusively, in consideration of purchase of a certain amount of such goods within a

specified time, a breach of the contract by such manufacturer subjects him to liability for damages. *Ansbacher-Siegle Corporation v. Miller Chemical Co.* 142
2. Where continuance of a sales contract is dependent on payment for purchases of merchandise as they become due, the making of a renewal contract by the parties after payments for merchandise become delinquent is waiver of the breach. *Ansbacher-Siegle Corporation v. Miller Chemical Co.* 142
3. The measure of damages for breach of a sales contract is such an amount as will compensate the injured party for all damage or detriment proximately caused by the breach, including profits lost, which can reasonably be proved, during the life of the contract. *Ansbacher-Siegle Corporation v. Miller Chemical Co.* 142

Rape.

In a prosecution for rape, it is not essential to a conviction that prosecutrix be corroborated by testimony of other witnesses as to the particular act constituting the offense, but it is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn. *Haynes v. State* 69

Schools and School Districts.

1. The power of a school board to employ a teacher implies the power to dismiss him for cause. *Arehart v. School District* 369
2. Members of a school board act as representatives of the school district and not as individuals. *Arehart v. School District* 369
3. In determining a school-teacher's fitness for continued service, a school board acts in a quasi-judicial capacity, and its dismissal will generally be upheld. *Arehart v. School District* 369
4. In absence of a statute authorizing dismissal of a school-teacher at the school board's pleasure, dismissal without sufficient cause may be redressed in an action for damages for breach of contract. *Arehart v. School District* 369
5. A school board was justified in dismissing the superintendent of schools for engaging in a fight with a teacher in a school building. *Arehart v. School District* 369

Specific Performance.

In a suit to rescind a contract for sale of land, wherein

defendant sought specific performance, evidence sustained decree for specific performance. *Union Central Life Ins. Co. v. Cover* 260

States.

1. A statute giving a court jurisdiction in actions against the state is sufficient authority for bringing an action without a special statute giving consent of the state to be sued. *Anstine v. State* 148
2. In the compensation law, the state has waived its sovereignty and has consented to be sued in actions arising under the law. *Anstine v. State* 148
3. The department of banking is a governmental agency of the state, and a suit against it is a suit against the state. *Anstine v. State* 148
4. In a compensation case, service of summons on the state, pursuant to provision of the general statute, was void. *Anstine v. State* 148
5. Where an appropriation for salaries and maintenance in the office of the attorney general vested in the attorney general and the state engineer a discretionary power in the expenditure of the fund, there must be an affirmative determination by both officials before an expenditure can be made from the fund, and approval of the expenditure by the state engineer was indicated when he required and received legal advice and service from the attorney general. *State, ex rel. Johnson, v. Tilley* 173
6. The state's special appearance in compensation case objecting to jurisdiction sustained, no provision for service of process on the state being provided by the compensation law. *Callen v. State* 192
7. A legislative act dedicating realty to use of a church *held* a grant of an estate in fee simple defeasible with a limitation on its use. *State, ex rel. Hunter, v. Home Savings & Loan Ass'n* 231

Statutes.

1. In construing a statute, the legislative intent is to be gathered from the necessity or reason for its enactment, and its provisions should be construed together. *Anstine v. State* 148
2. As to issuance and service of summons on the state, the state is not bound by a statute providing for service in general terms. *Anstine v. State* 148
3. An act complete in itself may amend or modify provisions of existing statutes without controverting con-

stitutional provisions relating to amendments. *Live Stock Nat. Bank v. Jackson* 161
4. Separable invalid portions of an act which were not an inducement to its passage may be rejected and valid portions upheld. *Nelsen v. Tilley* 327
5. If a statute is subject to more than one construction, one of which makes it constitutional and the other unconstitutional, courts must adopt the construction which makes it constitutional. *Nelsen v. Tilley* 327
6. A section of a regulatory statute providing that the administrator may deny an application or revoke a license for wilfully discriminating in favor of one purchaser of a motor vehicle against another is void for indefiniteness, where the element of wrongful intent is not included, since all wilful discriminations are not unlawful. *Nelsen v. Tilley* 327
7. Where unconstitutional portions of an act can be separated from the valid portions, and the invalid portions did not constitute an inducement to passage of the valid parts, the invalid portions may be rejected and the valid portions upheld. *Lennox v. Housing Authority of City of Omaha* 582
8. The housing authority acts are not broader than their titles. *Lennox v. Housing Authority of City of Omaha*.. 582
9. Statutes *pari materia* must be construed together so as to give effect to all, if possible. *Lennox v. Housing Authority of City of Omaha* 582
10. Statutes should be so construed as to give effect to the legislature's intention, and if a statute is plain and unambiguous, there is no room for construction. *Federal Farm Mtg. Corporation v. Thiele* 626
11. Penal statutes must be strictly construed. *Macomber v. State* 882
12. While a penal statute is required to be construed strictly, it should be given a sensible construction. *Macomber v. State* 882
13. In a strict construction of a penal statute, the presumption exists that the legislature intended exceptions to its language which would avoid results of injustice, oppression or an absurd consequence. *Macomber v. State* 882

Subscriptions.

A donation to a university, payable after donor's death, is subject to the implied condition that it is not to be paid until debts of donor's estate have been satisfied. *In re Estate of Luce* 846

Taxation.

1. Matters which might have rendered an unconfirmed tax sale voidable in a scavenger suit on the ground of fraud cannot be made the subject of a collateral attack. *Frank v. Carpenter* 357
2. Tax sale certificates in a scavenger proceeding may be surrendered for cancelation at any time in order to clear the public records and give effect of a redemption from the sale, even after expiration of time in which the purchaser can acquire title to the property. *Frank v. Carpenter* 357
3. A decree in a tax scavenger suit will not be held void at plaintiff's instance merely because notice is not directed to "All Whom It May Concern." *Marker v. Scotts Bluff County* 360
4. A sale in a tax scavenger suit was not void because proof of notice of sale was not filed in the office of the clerk of the district court before the sale was held. *Marker v. Scotts Bluff County* 360
5. A statutory provision that the holder of a certificate of tax sale in a scavenger suit may surrender it to the county treasurer with request for its cancelation, and that such cancelation shall have the effect of a redemption from the tax sale, is not a provision for release or commutation of taxes. *Marker v. Scotts Bluff County* 360
6. "Actual value" of property for purposes of taxation means "its value in the market in the ordinary course of trade." *Nebraska State Bldg. Corporation v. City of Lincoln* 535
7. The valuation of property for purpose of taxation as fixed by the board of equalization is final, unless shown by clear proof to be erroneous. *Nebraska State Bldg. Corporation v. City of Lincoln* 535
8. An erroneous and excessive valuation of property for purpose of taxation, as fixed by the board of equalization on complaint of the owner, may be corrected in a proceeding in error. *Nebraska State Bldg. Corporation v. City of Lincoln* 535
9. The housing authority is a governmental subdivision and its property and bonds are exempted from taxation. *Lennox v. Housing Authority of City of Omaha* 582

Telegraphs and Telephones.

Under federal court rules, recovery cannot be had for mental pain and anguish arising out of negligent failure of a

telegraph company to deliver an interstate telegram. *Burke v. Western Union Telegraph Co*..... 878

Theaters and Shows.

1. An act prohibiting "all public exhibitions of hypnotism, mesmerism, animal magnetism, or so-called psychical forces, for gain," does not prohibit spiritualistic seances, unless they are public and open and for gain. *Dill v. Hamilton* 723
2. The police power to prohibit public exhibitions for money-making purposes or for gain extends to harmful, immoral or indecent performances, though conducted in the name of religion. *Dill v. Hamilton*..... 723
3. A guaranty of $15 to remunerate a medium for conducting a spiritualistic seance as a religious ceremony and creation of the fund by voluntary contributions of communicants of the Spiritualistic Church do not constitute "gain" within the statute forbidding public seances for gain. *Dill v. Hamilton*..... 723

Trial. SEE APPEAL. CRIMINAL LAW.

1. In suits not triable by jury as of right, a verdict of a jury is advisory only. *In re Guardianship of Warner*.... 25
2. Where a litigant desires to offer all of a deposition in evidence, the proper procedure is to offer the deposition by question and answer, and thereby give the opposing party opportunity to object to the admission thereof, and also to give opportunity to the trial court to rule thereon, subject to statutory limitations applicable to depositions. *Hill v. Interstate Transit Lines*..... 110
3. Correct instructions to the jury do not cure prejudicial error in other misleading and contradictory instructions on the same issue. *Bocian v. Union P. R. Co*..... 318
4. A judgment will not be reversed for alleged error in an instruction, where the instructions, considered in their entirety, are not prejudicial. *Spangler v. Brown*..... 510
5. Refusal to give proffered instruction on measure of damages was not error in view of court's instructions. *Pearse v. Loup River Public Power District*..... 611
6. Where the evidence is insufficient to sustain a judgment for plaintiff, it is the court's duty to sustain a motion for a directed verdict for defendant. *Redwelski v. Omaha & C. B. Street R. Co*..... 681
7. Instructions defining the duties of passengers riding in a street car, approved. *Whittaker v. Omaha & C. B. Street R. Co*..... 800
8. It is not error for the court in an instruction to assume

as true facts that are established by the evidence without controversy. *Whittaker v. Omaha & C. B. Street R. Co.* 800

9. Harmless error in instructions does not require reversal. *Whittaker v. Omaha & C. B. Street R. Co.* 800
10. In action for negligence against carrier, giving an instruction defining "ordinary care" and "negligence" was not prejudicially erroneous, where a proper instruction was given as to the care required of a common carrier. *Whittaker v. Omaha & C. B. Street R. Co.* 800
11. An instruction defining duties of passenger riding in street car to use reasonable care for his own safety was not prejudicially erroneous. *Whittaker v. Omaha & C. B. Street R. Co.* 800
12. An instruction that a street car company was under no obligation to keep a car immovable until passenger had reached a seat in the car was not prejudicial. *Whittaker v. Omaha & C. B. Street R. Co.* 800
13. An instruction that there was no liability on the part of a street car company for ordinary jerks and lurches incident to starting and stopping of a car was not prejudicially erroneous, where the instruction also stated that plaintiff had the burden of proving that the jerking or lurching was of an unusual character. *Whittaker v. Omaha & C. B. Street R. Co.* 800
14. In absence of a specific request, failure of the trial court to define terms used in a requested instruction is not error. *Horn v. Goldberg* 813

Vendor and Purchaser.

Where purchaser contracted to maintain buildings on premises from date fixed for performance by contract to purchase, and pending negotiations for settlement he entered into possession, purchaser was not entitled to reduction in purchase price for waste or depreciation occurring to buildings after date fixed for performance of contract and after he entered into possession. *Union Central Life Ins. Co. v. Cover* 260

Waters.

1. Charges for irrigation water sold and delivered to land are not a lien on the land, unless made so by statute or by contract. *Union Central Life Ins. Co. v. Cover* 260
2. In order to create a lien on land for charges for irrigation water by contract, the language used must by its terms be a direct declaration that such a lien is created. *Union Central Life Ins. Co. v. Cover* 260

3. The measure of damages for flooding of a leasehold is its diminution in value for the remaining term. *Thies v. Platte Valley Public Power and Irrigation District* 344
4. In an action for damages from flood waters, question of proximate cause was properly submitted to the jury. *Thies v. Platte Valley Public Power and Irrigation District* 344

Wills.

1. The intention of the testator, as ascertained from his will, must be given effect, if not prohibited by law. *In re Estate of Wantz* 307
2. Where it is apparent from the terms of the will that proper debts of a beneficiary are to be deducted from his legacy, such intent governs. *In re Estate of Wantz* 307
3. Parol evidence, including evidence of testator's conduct subsequent to execution of will, and entries properly identified in an account book and other memorandum showing amounts paid, were admissible in proof of ademption of a legacy. *In re Estate of Wantz* 307
4. Where evidence shows intention of testator to satisfy a legacy by gift or payment subsequent to execution of will, such intention is controlling, and the burden of disproving it is on the one denying it. *In re Estate of Wantz* 307
5. A devise of realty to a designated person "and his heirs forever," without power to sell, mortgage or otherwise encumber, vests such designated person with a fee simple title, the restraints against alienation being void because repugnant to the estate devised. *State Bank of Jansen v. Thiessen* 426
6. In construing a will, courts must carry into effect the testator's true intent, as determined from the whole instrument. *In re Estate of Hart* 843
7. Where there are two provisions in a will relating to disposition of the same property, relative positions of the provisions in the will are unimportant, if the testator's intent can be ascertained by construing the provisions together. *In re Estate of Hart* 843
8. Where it can be reasonably done, a court will harmonize ambiguous expressions in a will with the plain provisions to effectuate the testator's intent. *In re Estate of Hart* 843
9. Where testator's intent with reference to specific property is plain in one part of a will, a court will not, in another part relating to the same property, create an ambiguity by construction. *In re Estate of Hart* 843

Witnesses.

1. In action for damages for injuries sustained in automobile collision, permitting answer by witness that certain statement was made to a "lawyer for the insurance company" was not error, where there was no bad faith involved. *Gleason v. Baack* 272
2. When a party offers a witness, the relation of the witness to the thing in issue and his interest in the result become material as affecting his credibility. *Gleason v. Baack* 272

Work and Labor.

An implied contract results where one performs useful services for another with his knowledge and with expectation of being paid therefor, and the other party by his conduct indicates that he knew or should have known that the services were to be paid for. *Wrede v. City of David City* 194